

Submission to EU Commission Consultation: Content Online in the Single Market

QUESTIONS

Types of creative content and services online

1. Do you offer creative content or services also online? If so, what kind of content or services? Are these content and services substantially different from creative content and services you offer offline (length, format, etc.)?
2. Are there other types of content which you feel should be included in the scope of the future Communication? Please indicate the different types of content/services you propose to include.

- 1. All European commercial broadcasters are at various stages of moving beyond a television-only distribution model to a future in which audiovisual content is distributed across as many platforms as are commercially viable. The speed of this evolution will vary as between operators and as between markets. But examples include offering subscription services simulcast via broadband internet, mobile TV, new on-demand services via IPTV etc. Depending on the platform, the content and services may indeed vary – to cite an obvious example, content for mobile distribution may be reversioned into shorter packages than for conventional broadcast. Indeed, a radical, but defensible, viewpoint would be that there is no such thing as online content: in the future, all content will be distributed online, either exclusively or simulcast with an offline distribution. But new content – or rather, adaptations of existing formats – may be necessary for some parts of the new value chain, with mobile distribution of broadcast content being an obvious example, due to different consumer usage.*
- 2. The forms of content identified appear to be comprehensive. Indeed we welcome the fact that the European Commission has chosen to consider all relevant forms of content in this exercise, rather than only specific ones. However we would argue that ideally the Commission ought to find one, agreed definition and use it consistently across all policy initiatives from all parts of the EU Commission. There are some forms of content which are covered by this questionnaire yet which are excluded from the definitions used in the Audiovisual Media Services directive, while there are different definitions again of*

“online” in the Recommendation on Music Licensing or in the various DG COMP investigations into the sector.

Consumption, creation and diversity of online content

3. Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of a violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.

4. Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?

5. How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?

6. How far is cultural diversity self-sustaining online? Or should cultural diversity specifically be further fostered online? How can more people be enabled to share and circulate their own creative works? Is enough done to respect and enhance linguistic diversity?

3. *The speed at which services are being launched, and at which consumers are signing up for these services, suggest that the current legal, technical and business environment is broadly satisfactory. The focus, we would argue, should instead be on proper implementation of that legal framework. For example, the e-Commerce Directive introduces a number of rules that are designed to create an ambiance of trust, thus fostering consumer confidence online. However, it would be important to access the actual functioning of rules, such as art. 18 and the incentives for self-regulation between ISPS. Without workable access control – including DRMs – it is impossible to sustain commercially viable VOD offers. We will develop this point further at para 21 below.*

4. *Levels of consumer take-up would suggest that adequate account is taken of genuine consumer concerns. We would urge policymakers to pay attention to actual market behaviour of consumers as well as the more theoretical concerns sometimes advanced in this area.*

5. *As the European Commission pointed out in its Communication of February 2006 on Interoperability of Digital Television Services, while interoperability remains a*

desirable policy goal, it is better achieved by market players than by top-down regulation. We would agree with this analysis.

6. *The European Commission is on record as stating that “the online environment is about as culturally diverse as it gets. There is no section of the community, no musical taste, no interest – however minority - that is not represented there”(Commissioner McCreevy, 3 October 2006). We entirely agree with this analysis, and hope it will be consistently shared by all national and European policymakers. In particular, the minimal barriers to entry in the online world mean that top-down regulatory intervention – as will doubtless be advocated by some interest groups - is entirely inappropriate.*

Competitiveness of European online content industry

7. If you compare the online content industry in Europe with the same industry in other regions of the world, what in your opinion are the strengths and weaknesses of our industry in terms of competitiveness? Please give examples.

7. *We have not conducted any such analysis. Although it is not a priority issue for our businesses, we would encourage any international exchange of information from initiatives to encourage familiarity with the online environment, encouraging use of the Internet in curricula and increased Information Society awareness.*

New business models and transition of traditional ones into the digital world

8. Where do you see opportunities for new online content creation and distribution in the area of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?

9. Please supply medium term forecasts on the evolution of demand for online content in your field of activity, if available.

10. Are there any technological barriers (e.g. download and upload capacity, availability of software and other technological conditions such as interoperability, equipment, skills, other) to a more efficient online content creation and distribution? If so, please identify them.

11. What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of the different players to secure a sustainable revenue chain for creation and distribution online?

8. *As we mentioned in our response to Q1, media companies will develop different distribution strategies depending on their market. All of the platforms mentioned in*

your question (and others, such as news via PlayStation) are being trialled or launched in different European markets at present. In as far as it is possible to generalise, these services will in the first instance be offered on the same basis as our established broadcast services, i.e., predominantly on a national/linguistic basis. The mainly national structure of European television means that there are few media brands with pan-European consumer appeal, so the commercial potential of European-wide services may be limited for the time being. Alternative means of distribution may arise when, and if, suitable business models can be developed.

9. *We're not aware of any such pan-European data other than that which is already in the public domain (not least, on the DG INFOSOC website).*

10. *While all of the issues identified may indeed arise from time to time, the pace of technological progress is such that these are rarely insurmountable.*

11. *The challenges in developing a sustainable revenue model for paid-for entertainment content are broadly similar in the online world as the offline, with the exception of the increased threat of piracy, which we address below.*

Payment and price systems

12. What kinds of payment systems are used in your field of activity and in the country or countries you operate in? How could payment systems be improved?

13. What kinds of pricing systems or strategies are used in your field of activity? How could these be improved?

12/13. *These questions are better answered by individual operators than by an industry body.*

Licensing, rights clearance, right holders remuneration

14. Would creative businesses benefit from Europe-wide or multi-territory licensing and clearance? If so, what would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?

14. For reasons we set out in our answer to Q8 above, we expect that the right to distribute primary content will continue to be traded primarily on a national basis, as this better reflects the national/linguistic structure of European consumer markets. It is frequently asserted that there are "copyright questions" which partly explain broadcasters' reluctance to market our services outside national or linguistic boundaries. The question of how rights are sold is partly one for sports bodies, film producers. But it is instructive to note that the European Commission actively encourages the sale of rights along national lines; DG Competition recently intervened specifically to prevent the English FA Premier League from selling Irish broadcast rights alongside UK rights, insisting instead that a separate sale of Irish rights was organised.

Subject of course to competition law, a fundamental principle of copyright law is that authors and other rightsholders may determine how their works are exploited (thereby encouraging creativity and investment in content). Encryption of broadcasts is therefore an important tool which protects copyright by allowing creators to restrict exploitation to those territories for which they are being paid.

However, the main reason why few classical, linear television channels are available beyond national frontiers is that there appears, in our judgment, to be no way of making a profitable business out of pan-European distribution of national television programming. The economics of content distribution in the online world may however be different, in which case the market may provide such services. We would expect the market to do so without the need for regulatory intervention.

15. Are there any problems concerning licensing and / or effective rights clearance in the sector and in the country or countries you operate in? How could these problems be solved?

15. The current model of collective administration of music rights in Europe needs reform. This process is underway, with the EU Commission playing an important role (Recommendation on Online Music; forthcoming CISAC decision)

Given the amount of music we play in our schedules, commercial broadcasters need a system of collective rights management (CRM). This is particularly so, given that acquired material such as movies already have the music included, so it is not the broadcaster's decision whether or not to play an individual piece of music. In other words, we need access to the "global repertoire".

We have several times made clear to DG MARKT and DG COMP that there are serious problems in the operation of the current system, many of which flow from the monopoly status enjoyed by local CRM societies. We will not repeat our previous submissions on these points in this consultation, other than to caution against the possible emergence of separate systems for online and offline licensing. Given that broadcasters, like all mass users, will increasingly simulcast content online and offline, we will require a coherent legal regime between the two.

16. How should the distribution of creative content online be taken into account in the remuneration of the right holders? What should be the consequences of convergence in terms of right holders' remuneration (levy systems, new forms of compensation for authorised / unauthorised private copy, etc.)?

16. At a time of significant transition in the market, with the development of digital distribution, it remains to be seen whether the issues for rights management which copyright levies were designed to solve can be effectively addressed in other ways, for example by the use of digital rights management technologies. Development of policy options at this time of transition must take into account the interests of all stakeholders,

the evolution of the market and the objective of safeguarding investment in, and revenue from, audiovisual content.

Legal or regulatory barriers

17. Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?

18. How does the country you mainly operate in encourage the development of creative online content and services?

17. In general, there are no insurmountable barriers. There may be specific issues, such as the reluctance of some rightsholders in some territories to make content available for mobile TV simulcast, but we are aware that the EU Commission plans a separate policy initiative on Mobile Broadcasting in the near future and will comment in more detail in this, specific, consultation. Our preference here would in any case be for contractual solutions to these issues. If there is appetite for EU-wide action, we would prefer to see an EU-backed campaign promoting legitimate content services and for greater attention to be paid to businesses' case against piracy (see answer to Q21 below)

18. N/A

Release windows

19. Are "release windows" applicable to your business model? If so, how do you assess the functioning of the system? Do you have proposals to improve it where necessary? Do you think release windows still make sense in the online environment? Would other models be appropriate?

19. Release windows are applicable only to some genres of television content, mainly movies and acquired series. Sports rights have a different logic, based on the importance of live transmission. Rather than being regarded as a good or bad policy tool in their own right, we would regard release windows as being a simple reflection of rightsholders (sellers) and media companies (buyers) negotiating a balanced structure which allows all parties to optimise their return on investment. In general we would prefer contractual arrangements to regulatory intervention here, as experience has shown that buyers and sellers of content are able to strike an effective balance. As we point out below, these windows are in any case becoming increasingly flexible, inter alia in order to protect the value of content against piracy.

Networks

20. The Internet is currently based on the principle of "network neutrality", with all data moving around the system treated equally. One of the ideas being floated is that network operators should be allowed to offer preferential, high-quality services to some service providers instead of providing a neutral service. What is your position on this issue?

20. *This is not yet an issue on which we have taken a position. Our default position is that the market operators will be able to negotiate an effective, balanced solution subject of course to scrutiny from European and national competition authorities. The existing principles set out in the New Regulatory Framework, in EU competition law, and in the powers of National Regulatory Authorities appear to be adequate in coping with potential issues here.*

Piracy and unauthorised uploading and downloading of copyright protected works

21. To what extent does your business model suffer from piracy (physical and/or online)? What kinds of action to curb piracy are taken in your sector/field of activity and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between “small” and “big” ones?

22. To what extent do education and awareness-raising campaigns concerning respect for copyright contribute to limiting piracy in the country or countries you operate in? Do you have specific proposals in this respect?

23. Could peer-to-peer technologies be used in such a way that the owners of copyrighted material are adequately protected in your field of activity and in the country or countries you operate in? Does peer-to-peer file sharing (also of uncopyrighted material) reveal new business models? If so, please describe them?

Joint Answer to QQ 21-23.

Contrary to what is often asserted, piracy is not exclusively a problem of the music industry and the movie studios. It is increasingly a concern for broadcasters as well. In our case, piracy is less likely to be a physical copy but more likely to be a pirated smart-card, a hacked DRM or a pirating of the broadcast signal (or, increasingly, of the pre-broadcast signal). Much of this piracy is currently governed not by the EU Enforcement Directive but by the Conditional Access Directive (and, we hope, in future by a WIPO Broadcasters’ Treaty). The latter directive has not been reviewed for some years, and the Commission at the most recent review chose to avoid addressing substantive piracy issues. We would like to see a more objective review of this directive in the near future.

Examples could include:

- a. The online piracy, from outside the EU, of live sport (this involves the signal of a legitimate rightsholder, maybe an Asian channel who holds the local rights for, e.g., German football, being pirated and uploaded onto the internet. The economic loss here is suffered not by the Asian broadcaster but rather the German rightsholder whose potential subscribers are tempted by the pirated version – particularly as it is easy to watch the Asian video while listening to a German radio commentary.)*
- b. The possibility, brought about by increased broadband penetration to download TV programmes. According to research carried out by the consultancy Envisional, illegal downloads of the hit series 24 in the UK increased from an average of 35,000 illegal downloads of each episode from series 3 (2003/04) to an*

average of 95,000 downloads of each episode from the new series 4 (2005/05), an increase of over 150%. Downloads of Desperate Housewives have shown a similar increase. This is already becoming commercially significant, as 95,000 is a significant number not only in terms of ratings for the show (which determine the advertising revenue) but also in terms of potential subscribers to the pay-TV platform which typically will have had first-run local rights (as noted above, acquired series tend to follow the same logic as movies in terms of distribution windows). This is already having an impact on the market, with the US studios narrowing the window between domestic and international debuts. The recent debut in Australia of the CBS drama "Jericho" within hours of its U.S. launch is an interesting precedent. This is also happening in Europe, with the deal for UK transmission of "24" now allowing this to happen within a week of its U.S. broadcast.

In terms of action taken to combat piracy, our individual member companies are of course active on the national level, in national anti-piracy organisations, in civil litigation and in co-operating with law enforcement authorities wherever possible. Education and awareness campaigns are very much part of this activity. The distinction between "small and big" pirates is not one we wish to see take root in European policymaking. Quite apart from the definitional issues, and the danger that today's small pirates are tomorrow's big pirates, it is important to remember the cumulative impact of piracy, as magnified by P2P technology. Although sufficient or adequate protection against P2P file sharing may be difficult to attain, broadcasters are of course well placed to help raise awareness among the public of the need to respect copyright and to fight against illegal activities.

Rating or classification

24. Is rating or classification of content an issue for your business? Do the different national practices concerning classification cause any problem for the free movement of creative services? How is classification ensured in your business (self-regulation, co-regulation)?

24. Rating and classifying content is an important part of media owners' responsibility to our consumers. The European Commission has previously concluded that differences in rating and classification are a reflection of consumers' different tastes rather than a barrier to the internal market, a conclusion we would share. Much of the detailed work in this area is carried out by the broadcaster/media company – i.e., self-regulation – though as with every aspect of our licensed business, this is subject to ultimate scrutiny from our statutory regulators, which presumably qualifies it as co-regulation.

Digital Rights Management systems (DRMs)

Digital Rights Management systems (DRMs) involve technologies that identify and describe digital content protected by intellectual property rights. While DRMs are essentially technologies which provide for the management of rights and payments, they also help to prevent unauthorised use.

25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?
26. Do you have access to robust DRM systems providing what you consider to be an appropriate level of protection? If not, what is the reason for that? What are the consequences for you of not having access to a robust DRM system?
27. In the sector and in the country or countries you operate in, are DRMs widely used? Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?
28. Do you use copy protection measures? To what extent is such copy protection accepted by others in the sector and in the country or countries you operate in?
29. Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability?

Joint answer to QQ 25-29: DRM systems are essential for video-on-demand services. Among the potential issues we face are circumvention of usage rights (consumer circumventing a “one-play” offer), P2P copy and distribution of content (NB the perfect quality of digital copies), illegal modification of content (issues for rightsholders) and the analogue hole (digitisation of an analogue output to near-perfect quality).

We therefore do believe that DRMs are “an appropriate means to secure the distribution of copyrighted material” in the online environment. While no DRM (indeed, no conditional access system) can ever guarantee 100% protection, systems have so far proved sufficiently robust for VOD services to be launched by ACT member companies. However, regular software upgrades can help avoid the service operator, in cases where the DRM is cracked, being obliged to suspend the VOD service – to the ultimate detriment of the legitimate consumer. We suggest that European consumers are increasingly familiar with such measures as a normal fact of life in the digital area, given the need to combat piracy in relation to software, television signals, music or online content.

In terms of the user-friendliness of a DRM, it is in our interests as operators to provide clear, comprehensible information to our consumers on the rights they acquire when subscribing to our services. Despite the noise made by some anti-copyright activists, the take-up for VOD trials suggests that consumers are interested in VOD services and accept the need for DRM protections.

Complementing commercial offers with non-commercial services

30. In which way can non-commercial services, such as opening archives online (public/private partnerships) complement commercial offers to consumers in the sector you operate in?

30. As long as these services are carried out on the usual commercial basis of negotiating a fair price with the rightsholder for use of their content, they could play a useful role in complementing commercial offers. In the specific case of broadcasting archives, we would stress that services launched by public sector

broadcasters require careful consideration under national and European competition law, given the potential for distorting or foreclosing emerging new media markets. Balancing this against the public interest in opening up – maybe to a range of users? - the content of archives financed by compulsory fees or other tax payers' contributions without tracing every individual who worked on the programme may require further examination of art 5/3 c) of Directive 2001/29/EC.

What role for equipment and software manufacturers?

31. How could European equipment and software manufacturers take full advantage of the creation and distribution of creative content and services online (devices, DRMs, etc.)?

31. This is a question for equipment and software manufacturers.

What role for public authorities?

32. What could be the role of national governments / regional entities to foster new business models in the online environment (broadband deployment, inclusion, etc.)?

33. What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?

32/33. It will be clear from our answers to the foregoing that a degree of regulatory forbearance is necessary in many areas. Any attempt by national or European regulators to pro-actively shape the emerging online content market is probably doomed to failure, given the pace at which services develop and consumer tastes evolve. Even in the area of competition law – which clearly will continue to apply in full to the new environment – issues of market definition may need to be constantly reassessed.

Areas where we believe regulatory intervention could be useful include:

- an objective and thorough review of the anti-piracy acquis (also at national level) to assess whether it needs to be updated for the new environment, or indeed whether better enforcement of existing legislation is needed;*
- an updating of the system of collective administration of rights*
- encouragement of industry efforts to develop standards;*
- co-operation on awareness campaigns about legitimate content services*