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Co-ordination Européenne des Producteurs Indépendants

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Response to the European Commission questionnaire on 'Types of creative content and services online.'

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.)?

European independent production companies produce different types of content exploited across a range of different platforms (linear and non-linear). CEPI represents approximately 4000 independent production companies in Europe, equivalent to 95 % of the entire European audiovisual production industry. Taken together, our members supply over 16000 hours of new programming each year to broadcasters in Europe, ranging from single documentaries and special event programming, to game shows, light entertainment and high-cost drama serials.

This content is translated in various formats in traditional media and new media platforms. Some well-known content that is presented in different formats on different platforms are for example: Big Brother, the Xfactor and Test the Nation.

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.

CEPI believes that there are a series of obstacles that are actually or potentially affecting the take-up of new creative content services:

Technical obstacles:

- More need to work with ISPs on DRM organization so as to create a consumer-friendly environment that takes into account the needs of right holders.
- Lack of interoperability of services, devices and platforms means less consumer options and again could generate higher degree of vertical integration.
- Speed and penetration of networks is still a limited issue in some regions that will tend to disappear

Business obstacles:

- Difficulty in defining categories of rights of exploitation in new on-demand platforms means that these new media rights are often bundled with other rights jeopardizing future revenues from the exploitation of those rights.
- Bundling of new media rights with primary rights of audiovisual content will potentially create excessive concentration in the content supply market, thus

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affecting the availability of quality content that can help sustain / grow new services.

- Lack of certitude on future business models for new services: consumer funded/funded by advertising derive from different models
- Difficulty to attract investment into new services due to the lack of certitude of business models
- The complexity to clear rights with all the right holders.

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?

Interoperability will allow for multiple exploitation of content, by creating new opportunities and platforms to exploit this content. This will also entail more competition by new services to get the best available content. Interoperability is an important factor in providing content online, however, it is essential that interoperability takes copyright into account and that it does not in itself provide means to infringe copyright.

The current legal framework does not do enough to foster interoperability of services, devices and platforms. Whereas we recognize that interoperability should be dictated by the market place, there is a role for the legal framework to encourage interoperability.

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?

Cultural and European diversity can be self-sustaining if European content is widely available. This is best guaranteed in an open program supply market (refer to answers on question 8 and 11). Cultural Diversity is typical of European content, however, should there be no content then there would also not be any diversity. Independent production companies are instrumental to guarantee a variety of content that is representative of the diversity of Europe, its regions and its Member States. If European content is not widely available but concentrated in the hands of a few major players in the market, new media platforms will buy cheap and readily available US content.

The new media environment must contribute to the promotion of diversity as guarantees for innovation and creativity.

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.

Due to the nature of the European market, there is a linguistic fragmentation of the market. Also compared to other markets, such as the US and India, content producers in Europe are in a far less advantageous position financially.

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?

Independent production companies would like to use all the services/ platforms of online content distribution to disseminate their content. The intention is to make the content available to as large an audience as possible. The consumer should be able to access content. However, the current regime for negotiating new-media rights across most countries in Europe means that the rights for the exploitation of independent content in new media platforms will remain the exclusive and perpetual property of the commissioning terrestrial broadcaster (without the independent production company being compensated for the exploitation of those rights). This level of concentration in the content supply market is contrary to the interests of a sound economic environment where new services can thrive and is contrary to the interests of European consumers of content.

More than any other link in the market chain, producers have a vested interest in exploiting the content that they produce across a range of different platforms. As long as there is a demand for content, producers will continue to produce content.

Broadcasters can be an obstacle to the dissemination of content by independent production companies. There is a high risk of warehousing of content due to the bundling of new media rights and primary rights. There should be stricter limitations on broadcasters to either use the content or loose the right to exploit it online. This could be done using time limitations, e.g. should the broadcaster not exploit the new media rights of certain content in X amount of time, then the new media rights are automatically transferred back to the producer to exploit.

The US regulators have addressed the issue of warehousing through their Financial Syndication Rules (Fin Syn Rules) back in the 1970s for traditional services. The separation between exhibition and television production enshrined in those rules drove investment in innovative programming for television channels from independent producers. This in turn allowed "majors" to become important producers/publishers of television entertainment and compete in the international scene. The same principles used by the US regulator in the 1970s to tackle warehousing of content should underpin Europe's action in the new media environment.

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?

Holding on to new media is a major issue for independent production companies. The financial health of European production companies remains weak. Greatly because in most Member States (with the exception of the UK and France) independent production companies have not been able to retain and exploit the secondary rights over their productions.

We believe that the concept of independence must be directly linked to the concept of secondary rights' retention. In a market environment characterized by vertical integration and considerable concentration of market power in the hands of a few major players (the terrestrial broadcasters), the power exercised by these players in the acquisition of rights (especially new media rights) already means that independent production companies are unable to fully exploit new forms of content distribution. Unable to retain rights, independent production companies are unable to attract capital investment and grow. They remain heavily under funded and with limited power to invest in new quality content. The entire media sector misses out on the possibilities of attracting capital investment that will be used to invest in new quality content.

This level of concentration stifles innovation and growth. It is a vicious circle that has only been broken in countries where measures to promote the ability of production companies to hold on to and exploit their secondary rights have been taken.

It is therefore essential that like in the UK and France, national authorities create measures to ensure that independent content production companies are able to retain their IP and exploit these assets in a competitive and open market.

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?

Whereas Europe-wide or multi-territory licensing and clearance might provide a practical solution for some stakeholders it should be regarded as a business choice. Such licensing/clearance is sometimes too costly for some stakeholders and thus not a viable solution.

Legal or regulatory barriers

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

The Member State where the most work has been done on creating a feasible/fair way of exploiting new media rights is the UK. We believe that other European Member States will consider the UK model in developing their own models for a viable and competitive creative economy for the 21st century.

Codes of Practice in the UK / New Media Rights:

- o Early in 2006 Ofcom asked the industry to discuss the terms of trade concerning new media rights.
- o Throughout 2006 discussions took place between PACT and UK terrestrial broadcasters individually
- o Agreements were reached for a period of 2 years, at which point the terms of the agreements will be reviewed.

Some details of the agreement are included below:

- o Use or Lose concept is used.
- o The basis for revenues sharing between production companies and commissioning broadcasters is based on a 50%-50% revenue split.
- o The codes of practice are designed to impede “warehousing of rights”

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?

Release windows remain applicable to our business model. Again the UK precedes other Member States in finding a solution to the ‘release window’ issue in the online world. The agreement that the independent production association and the broadcasters have worked on in the course of 2006 recognises the importance of terrestrial broadcasters in playing a key role in the commissioning / financing of quality, innovative content. As such, the terms of the agreements in the UK allow ‘exclusivity windows’ (of 7 days for the BBC and 30 days for commercial broadcasters) that broadcasters will benefit from for on demand platforms.

If release windows are not used then there will be an increased possibility of warehousing of content which in turn will lead to piracy and naturally a cut off of a very lucrative revenue stream.

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?

CEPI would like to see all forms of piracy tackled. There is a need for commitment from law enforcement agencies and ISPs to dedicate resources in addressing piracy in general.

The European Union can play an important role especially in what concerns enforcement in third countries (outside the European Union). The recent Action Plan for the Enforcement of Intellectual Property in countries is already an encouraging step towards a greater degree of engagement by countries in the main trading partners of the EU.

On a different level there is a role for the EU to promote best practices in direct-to-consumer campaigns that will help creating higher consumer awareness for the importance of intellectual property rights. Although these campaigns should be undertaken at national / local level, CEPI would favour a more active role of the EU in promoting best practices in this area.

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?

Industry and government have a role to play in ensuring public awareness on copyright, respecting intellectual property rights and how a consumer can be deemed to have infringed content's copyright.

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?

Provided the peer-to-peer service are legal, there is no problem having such services online.

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?

DRM is definitely a means of protection of content in the online arena, however it is not now and probably will never be secure enough to be the only means of protection of content and compensation for copying of content. DRM should therefore continue to be complemented with traditional means of compensation for copying such as the copyright levies system – where applicable. DRM is an essential element in ensuring that interoperability will be limited to the scope of the copyright protection on content.

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?

Non-commercial services can be used in the online arena, thus making more content available. It is essential that the right holders be compensated for the use of their content however. There are some good examples of such services, which are already in place, such as the library of public broadcast programs in the Netherlands being available for use by schools and universities. This was made possible through an agreement with all the right holders to license the rights on their content for educational purposes.

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.)?

It would be very helpful if the national/regional governments try to foster initiatives to find a feasible/fair means of exploiting new media rights (such as the UK example). It is also the role of national and regional government entities to foster open markets and ensure that warehousing is kept to a minimum to allow maximum use of European content.

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?

It would be useful if a mapping document could be prepared at European level to demonstrate the trends in use of content across the EU.

It is essential that the review of the Television Without Frontiers Directive take the online market into account. It would also be helpful, bearing in mind that the market/business changes so rapidly that provisions regarding the online arena be reviewed prior to the overall review of the Directive in the future.