



Copyright_Levies_Reform
Alliance

CLRA RESPONSE TO THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON CONTENT ONLINE IN THE SINGLE MARKET

October 2006

The Copyright Levies Reform Alliance* welcomes the opportunity to respond to the Commission's Consultation on Content Online in the Single Market. Please note that we have not responded to every question in the survey. Instead, we offer comment only on those questions where we feel our experience best enables us to make a meaningful contribution.

Executive Summary

Europe's online content market has grown exponentially in recent years. High consumer demand has driven the advent of many new and exciting technologies and services that give creators the confidence to make their digital works available online and that enable users to enjoy creative content how they want, when they want and at a price they want. However the uptake of the European online content is hampered by copyright levies that consumers may be paying twice, sometimes more, to compensate for private copying. Copyright levies raise the purchase price of ICT and CE products and result in less sold devices. The less mobile audiovisual players and other devices are sold the less content is sold, putting European online content in a disadvantage.

We encourage the Commission to stay its course and modernise the copyright levies system in order to allow the market to evolve forceful. Our comments below endorse the following approaches to guide this effort:

- **A light-handed regulatory touch:** In dynamic and constantly evolving markets such as online technologies and services, overly extensive regulation can impede innovation. A light regulatory touch, in contrast, tends to provide the optimal

* The Copyright Levies Reform Alliance (CLRA) is comprised of representatives of the ICT and digital media industries represented by the Business Software Alliance (BSA), European American Business Council (EABC), European Digital Media Association (EDiMA), European Information & Communications Technology and Consumer Electronics Association (EICTA), the Recording-media Industry Association of Europe (RIAE) and the European Semiconductor Industry Association (ESIA). Some CLRA members have also made their own individual submission on the consultation which highlights the sector-specific views on some of the issues raised in it.

framework, enabling innovative firms to find market-driven solutions and respond quickly and efficiently to consumer demands.

- **Faithful transposition and application of Article 5.2(b) of the European Copyright Directive to phase out levies:** Many Member States have not transposed faithfully Article 5.2(b) into national legislation. No Member State (with the exception of the Netherlands for one single product) takes into account the application of TPMs. The Commission should take the appropriate action to ensure that Member States transpose, implement and enforce this provision and continuously phase out levies over time.
- **Applying transparency to collecting societies:** The copyright levy-setting process is incoherent and non-transparent in many countries. We call on the Commission to require greater transparency and equity in this process as well as greater public access to information regarding how levies are calculated, justified, collected and distributed.
- **Support for technologies that protect online content and ensure user security:** Digital rights management systems (DRMs) and other forms of security and privacy-enhancing technologies are fundamental to the success of the online content market. Creators rely on them to protect their valuable digital works, and users trust them to ensure their safety online. The integrity of these protections must not be undermined.

Support for the European Commission Recommendation on Copyright Levies Reform:

We strongly believe that the upcoming Recommendation will provide guidance on how the increasing application of TPMs should be reflected in levy calculations while copyright levies and TPMs coexist and levies are phased out. Likewise minimum transparency requirements should be applied to collecting societies that would help to improve accountability towards authors, consumers and industry. These efforts rightly merit the strong support from and are emphasized by the EU Commission.

Responses to Survey 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.)?**

CLRA members are involved with “creative content” in a variety of ways. Many of our member companies are directly engaged in the creation of a wide spectrum of online content. Our member companies also manage the networks over which this content is distributed, accessed and enjoyed; provide the technologies and services that enable these uses; and create the software that allows content providers to manage the online usage of their works and that promotes and protects network security and user privacy.

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

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

Surveys predict continued dramatic growth in the online content market. In 2005, for example, a CLRA-commissioned study demonstrated that the DRM-enabled online music market is growing exponentially in Europe, and is expected to reach €559 million by 2008, compared with €27 million in 2004. A more recent study by Forester Research forecasts an increase to €1.14 billion in 2008. By 2011, the online music market in Europe is expected to grow to €3.9 billion, representing 36% of the total music market (online and physical carrier sales). This implies a very important growth and a substantial share of the market, and ought to be reflected in the evolution of copyright levies systems.

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.

The potential technological barriers listed in this question deserve separate attention, so we address each separately.

- **Download and upload capacity.** For years, CLRA members have supported governmental efforts to encourage consumer uptake of broadband, including by providing incentives for private-sector investment in infrastructure. That said, users in most regions of the EU today have relatively affordable access to broadband Internet, and private investment in broadband infrastructure in the EU seems to be healthy. Accordingly, while we continue to support government efforts in this area, we do not believe that limitations on data transfer capacity present a serious technological barrier to the growth of online content, at least for the majority of European consumers or businesses.
- **Availability of software.** Online content is typically accessed through browsers, media players, text readers, and similar software programs. These programs are widely available for free or at very low cost, and prices for such programs are if anything decreasing. Thus, there are no grounds whatsoever for believing that the availability of software poses a barrier to online content. On the contrary, the ubiquity of extremely affordable if not free software for accessing online content has been one of the key drivers of growth in this area.
- **Interoperability.** On the narrow question of interoperability, the evolution of a healthy online content market as a response to piracy is challenging, takes time to develop and requires significant innovation. This is reflected in the many different models and services that are being launched on a regular basis, in an attempt to find the right balance between right holder needs and consumer expectations. Online content distribution requires considerable technical flexibility and while complex in design, should be simple for the consumer and allow the consumer to make informed decisions based on easily available information. Trying to manage through regulation these emerging services and models will stifle innovation and leave right holders, service providers and consumers with limited choices and offerings.

CLRA members support industry lead efforts to inform consumers about playability and usage rules of their products. Such notices would provide sufficient criteria to enable consumers to purchase the product that best fits their needs.

- **Role of competition law:** Unless there is a stated abuse of a dominant position, both content providers and consumers have equally legitimate, pro-competitive reasons to request security features or agree upon playability features in the design of the

products or services. In order to avoid deceptive practices, however, usage rules and other playability features should be made clear to consumers (see also question 5, above).

- **Business models compatibility.** Interoperability between devices should not hide the inherent incompatibilities between different business models. Today's business models include paid downloads, subscription services and, in the near future, free content paid for by advertising to cite a few. In an ideal world without technical limitations even *the ideal* DRM technical solution would not be able to reconcile a 'download & pay' for your music model with a 'subscription' or 'streaming' service. Technology alone cannot reconcile the healthy diversity of business models and usage rules between consumers and content owners - unless one particular distribution model is imposed on all consumers.

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?

Yes, creative businesses benefit from multi-territory licensing and clearance. While the existing copyright protection regime in Europe does not require specific changes the national fragmentation of the internal market in terms of access to copyrighted repertoire limits the choice and offering available to consumers in different countries. Business should be free to license contents for online distribution in multiple territories from any collecting society of their choice. Additionally, businesses should be authorized to offer their products and services online under the same trade conditions (including copyright levies) that apply in their country of origin or negotiate such copyright levies in a multi-territorial basis with the collecting society of their election.

Finally, competition law should be strongly enforced against collecting societies involved in any practices that conduct to an allocation of territories or a ban of cross-boundaries online transactions within the Internal Market (or that incur in any other anti-competitive practice, such as abusive pricing or discriminatory practices).

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?

Yes. CLRA members are leaders in online delivery systems for creative content, particularly music. The lack of a Community-wide licence for rights in music has made the roll-out of these services in Europe laborious and time-consuming. Clearing on-line rights in music can involve securing the rights of communication to the public, making available and reproduction rights of performers and producers on a territory-by-territory basis.

CLRA supports a one-stop-shop mechanism to facilitate multi-territory licensing of music. Any such mechanism must permit user choice, however. Users must be free to choose the organisation, irrespective of location, whose licence offers the most suitable terms for their needs without losing any element of pan-EU coverage; user choice should not be limited by customer allocation provisions. A possible precedent for these types of arrangements was

established in the off-line world under the IFPI-BIEM framework agreements, where record companies could approach any authors' mechanical rights society within the EU and secure a Community-wide licence based on the reciprocal agreements that exist between the BIEM member societies.

Finally, it is worth to mention that there is an specific country (Spain) which have recently modified its Intellectual Property Act in July 06 in order to "transpose" the Copyright Directive 29/2001 and has introduced in its legislation a new remuneration right in favour of right-holders (collecting societies) for downloading of music and video which, to the best of our knowledge, has no parallel in the European Union.

In such regard, new articles 90.4 (concerning authors of audiovisual works) and 108.3 (concerning audiovisual and music artists) of the Spanish Intellectual Property Act provides such remuneration right on the recently acknowledged "*exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them*"

This unjustified remuneration has to be paid to collecting societies on-top of the licensing fees to be paid to right-holders and on top of any copyright levies that consumers will be requested to pay on devices and media that they use to download audio and video online.

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.)?

Developments in the online world—specifically, the advent of digital rights management systems (DRMs, discussed in greater detail in response to Questions 25-29)—demand a new approach to remuneration for right holders.

DRMs (and their technological counterparts, technological protection measures) enable content owners to articulate and enforce terms of usage directly, establish prices based on permitted usage, and collect payment directly — charging consumers only for the actual uses they make of works and ensuring authors are fully and exactly compensated for the relevant usage of their works. Meanwhile, consumers are unknowingly subjected to levies on a range of devices, typically in addition to payment made in the purchase of copy-protected content. This means consumers may be paying twice, sometimes more, to compensate for private copying. The ability of technology to permit greater individual management of rights means that existing remuneration regimes—most notably national private copy levy systems—must be revisited.

The EU legislative framework anticipates this. Specifically, the EU Copyright Directive (2001/29/EC) expressly requires that levies be adjusted to reflect the increasing application of DRMs. Unfortunately, however, to date Member States have failed to follow the Directive's mandate.

This failure directly impedes the success of online content services in Europe. At their most fundamental, levies on digital media and equipment undermine consumer purchasing power

and reduce sales of goods and services that support the online delivery of content. A recent Nathan Associates study¹ bears out this conclusion. Taking France as a representative market, the Study estimated that had levies not been imposed on MP3 players, 974,000 more of these products would have been sold in the market. By 2008, lost sales of online music due to the French MP3 player levy are predicted to reach €12.3million.

Overall at EU level, the Nathan Associates study estimates the economic impact of currently applied and undisputed levies in 2005 as follows:

- €1.33 billion direct effects on consumers
- €747 million direct effects on industry
- €71 million indirect effects on sales of online music. By 2008 these effects are forecasted to increase to €217 million - provided that levy rates do not increase over time.
- If claimed but disputed levies were to be included, the overall direct economic impact would amount to €4.4 billion in 2005.

We encourage the Commission to take action with regard to national levies regimes.² Specifically, Member States must be required to bring these regimes in line with Community law. This means that levies must decrease year-on-year to reflect the increasing application of TPMs/DRMs for specific categories of content and/or products. At the same time, collecting societies must bear the burden of demonstrating actual economic harm caused by the private copying for which levies are intended to compensate.

In parallel, the Community should move to require greater transparency and equity in the levy-setting process. Among other things, collecting societies should be obligated to provide greater public access to information regarding how levies are calculated, justified, collected and distributed. Likewise, mechanisms enabling the independent review of national levy systems and tariffs should also be established.

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?**

¹ <http://www.bsa.org/eupolicy/upload/Final%20Economic%20Impact%20Study%20-%20Nathan%20Study.pdf>

² For a detailed explanation of our views, we point the Commission to the recent response of the Copyright Levy Reform Alliance to the Commission's Consultation on Copyright Levies in a Converging World.

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?**

CLRA members approach DRMs from several different perspectives: as developers of DRM technologies; as content owners who apply DRMs to our own products; and as online service providers who use DRM systems to protect third-party content. These perspectives give us a rich understanding of DRM technologies and a deep appreciation of their potential uses.

In our view, DRMs offer exciting new opportunities for content owners and consumers alike. By making it easier to manage digital content and protect it from theft, DRMs give content owners the confidence to make their most valuable works available online. This in turn benefits consumers, who enjoy quick, inexpensive access to a greater amount and diversity of content than is typically available off-line, which can be accessed across a tremendous variety of devices. Rather than answer each of questions 25 through 29 individually, we focus our responses on three important issues raised in these questions.

- **Benefits of DRMs.** One of the important benefit of DRMs is that they help prevent theft of digital works. This is absolutely essential if online content services are to be commercially sustainable over the long term. As DRM systems have become more sophisticated, however, they also support an extremely diverse array of distribution and business models. Examples of such models include purchase and download of single works for unlimited use; superdistribution; subscription services; rental services; video-on-demand and pay-per-view systems; preview-based models; and real-time distribution of content. By supporting such a wide range of business models, DRMs give consumers more choices in accessing online content, promote competition, and give content owners greater flexibility in offering consumers viable and attractive alternatives to piracy.
- **Availability of DRMs.** DRM-enabled online content delivery systems are becoming increasingly commonplace and user-friendly. A large and growing number of successful online content delivery services already use DRMs, including such recognized names as Fnacmusic, Virginmega.fr, iTunes, Connect, Movielink and CinemaNow. Worldwide, 420 million songs were downloaded from legitimate music services in 2005 alone; over one million titles were downloaded from Fnac's online music service, Fnacmusic, between its launch in September 2004 and May 2005. A recent study by Forester Research forecasts an increase in the DRM-enabled online music market from €21 million in 2004 to €1.136 billion in 2008. Clearly, DRMs are satisfying an important and growing market need in the online entertainment market.

It is vital to recognise, however, that DRM-enabled online services extend well beyond traditional entertainment. For example, the British Library's secure electronic delivery service, which has made over one hundred million items available to researchers and library patrons worldwide, is DRM-enabled. DRMs also permit the distribution of business software applications through a range of delivery mechanisms and are critical to the ongoing task of upgrading the security of computer networks and reducing their vulnerability to viruses and other attacks. In larger enterprises, such as public sector bodies, "Enterprise DRM" solutions complement document

management systems and other standard security tools used to control access to sensitive information.

- **DRMs and interoperability.** Although market forces will drive increasing levels of DRM interoperability, DRM interoperability exists, at least to some extent, today. Many successful and widely deployed DRM technologies are openly licensed so that they may be implemented by virtually any device. Examples include DTCP, WMDRM, Helix, CSS, CPPM/CPRM, AACCS, and OMA DRM, to name just a few. Also, many of these DRM systems are licensed under rules that permit the handoff of content to other DRMs systems, provided that these other systems are recognized as “trusted” based on their ability to maintain downstream security for the content. Efforts are underway to facilitate such mutual trust between DRM systems through simple and cost-effective processes. In sum, while DRM interoperability challenges exist, industry has already made significant headway in resolving them, and we can expect to see much further progress in the near future.
- Ultimately, if playability features or security consideration reduce consumers’ experience, they will vote with their wallets by going elsewhere. Hence the need to avoid deceiving consumers’ expectations and to invite content providers to duly inform consumers of playability features attached to a specific offering (including, number of copies, playability features, etc).

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.)?

European companies are already heavily engaged in the creation and distribution of creative content and services online. Many leading European firms (some of which are mentioned in our response to Questions 25-29) have built successful services and solutions around DRM technologies and now play a key role in the management and delivery of online content. Europe’s mobile phone industry is also a market leader in deployment of creative content and services, as traditional single use mobile phones give way to multi-function devices connected to the Internet and supporting a wide variety of content offerings.

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.)?

We encourage national governments to work closely with stakeholders—including industry and users — to identify opportunities to foster new online business models. That said, we respectfully caution these governments to avoid unwarranted intervention in this area. In dynamic, fast-moving markets such as online technologies, the market itself is best placed to lead. New technologies are developing rapidly, and convergence is changing the way consumers receive and use information and content. Self-regulation ensures that industry maintains the ability to respond rapidly and appropriately to changing conditions and new consumer demands; rigid rules, in contrast, can hinder market innovation. A light-handed

regulatory touch also ensures that consumer demand and industry competition—not government regulation—determine which products and services succeed and which do not.

The evolution of a healthy online content market as a response to piracy is challenging, takes time to develop and requires significant innovation. This is reflected in the many different models and services that are being launched on a regular basis, in an attempt to find the right balance between right holder needs and consumer expectations.

Online content distribution requires considerable technical flexibility and while complex in design, should be invisible for the consumer and allow the consumer to make informed decisions based on easily available information.

Trying to manage through regulation these emerging services and models will stifle innovation and leave right holders, service providers and consumers with limited choices and offerings.

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?

We reiterate the points made in our executive summary as to the optimal approach:

- **A light-handed regulatory touch:** In dynamic and constantly evolving markets such as online technologies and services, overly extensive regulation can impede innovation. A light regulatory touch, in contrast, tends to provide the optimal framework, enabling innovative firms to find market-driven solutions and respond quickly and efficiently to consumer demands.
- **Faithful transposition and application of Article 5.2(b) of the European Copyright Directive to phase out levies:** Many Member States have not transposed faithfully Article 5.2(b) into national legislation. No Member State (with the exception of the Netherlands for one single product) takes into account the application of TPMs. The Commission should take the appropriate action to ensure that Member States transpose, implement and enforce this provision and continuously phase out levies over time.
- **Applying transparency to collecting societies:** The copyright levy-setting process is incoherent and non-transparent in many countries. We call on the Commission to require greater transparency and equity in this process as well as greater public access to information regarding how levies are calculated, justified, collected and distributed.
- **Support for technologies that protect online content and ensure user security:** Digital rights management systems (DRMs) and other forms of security and privacy-enhancing technologies are fundamental to the success of the online content market. Creators rely on them to protect their valuable digital works, and users trust them to ensure their safety online. The integrity of these protections must not be undermined.

The Copyright Levies Reform Alliance appreciates this opportunity to submit its comments in connection with the Commission's Consultation on Content Online in the Single Market and looks forward to working together with the European Commission and the Member States to support the uptake of the ICT and CE industry.

The CLRA and its Membership

The Alliance was officially launched on April 5, 2006. It represents the European information and telecommunications technology, consumer electronics, digital media and digital media recording industries. The Alliance members are: Business Software Alliance (BSA), European American Business Council (EABC), European Digital Media Association (EDiMA), European Information & Communications Technology and Consumer Electronics Association (EICTA) and the Recording-media Industry Association of Europe (RIAE).

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