



Public consultation on Content Online in the Single Market

EFCA welcomes the opportunity to contribute to the public consultation on Content Online launched by the European Commission.

The European Film Companies Alliance (EFCA, www.efcasite.org), founded in Brussels in September 1995, is a non-profit organisation with a scientific and artistic purpose. It aims to bring together European entrepreneurs active in film production and distribution. EFCA members include the following companies: AB Svensk Filmindustri (Sweden), Eurofilm Studio (Hungary), Filmkameratene (Norway), Lusomundo Audiovisuais SA (Portugal), Nordisk Film and TV A/S (Denmark), Pathé (France) and Producciones Aguamarga (Spain). It is an essential platform for information exchanges and business networking. EFCA considers that the following key issues are central to its mission:

- To promote European cinema within Europe and in third countries
- To encourage a sustainable and competitive European film industry
- To facilitate and improve access to EU grants and capital for the sector
- To sustain the development of digital distribution platforms
- To stimulate European co-production
- To liaise with film bodies, associations, film professionals and European authorities
- To raise awareness to the key issues at stake in the European film industry

VOD in Europe - the issues at stake

The number of VOD service providers across Europe has grown tenfold in the past four years, from 4 in 2002 to 40 in 2006¹. The analysis of the main platforms shows that more than 2,000 feature films are already available in Europe. TV content (fictions, documentaries, animation programmes, music videos) completes the offer. Besides blockbusters, catalogue films are becoming increasingly popular on VOD platforms.

¹ Source: NPA Conseil, The development of Video on Demand in Europe, May 2006.

Digital delivery provides new sources of revenues for audiovisual producers as it enlarges the spectrum of potential customers and offers a tool for international distribution at no additional cost. Digital platforms are an opportunity for European cinema to address chronic market access problems, especially as regards poor distribution of non-national European films. The "long tail" theory states that Internet will create a market which is no longer hit-driven - a market where niche and specialist products will attract small but faithful audiences whose weight, in economic terms, will equal that of mainstream works. European cinema has much to benefit from this scenario.

EFCA takes the view that VOD is a great opportunity for European cinema - the main reasons are as follows:

- VOD allows films to get wider distribution (the EU MEDIA programme will be instrumental in supporting European companies in this respect)
- VOD offers the possibility to unlock the stronghold of Hollywood majors on traditional distribution
- VOD is based on a business model that takes into account the fragmented nature of the film business in Europe
- VOD is the way forward to ensure that there is European content on line

The European film industry does not want to abide to the same destiny endured by the music business, which completely lost control of its pricing strategy. Film professionals want to promote the emergence of a wide offering of online services - we think that the best way to fight piracy is not to mourn against lost businesses and attack consumers, but to build a successful service which will make it easier to buy than to steal films.

We need help from the EU to engage with technology and software companies in order to narrow down the technical knowledge gap we face in the digital environment. We need national legislation to be reviewed to unlock the barriers to VOD development (revision should cover areas such as support mechanisms linked to theatrical releases, release windows, ratings and classification mechanisms). We need a MEDIA 2007 programme that makes the international distribution of European films a priority through the following actions:

- support digitization
- sustain collective efforts to license on an international basis
- develop platforms to engage with ISPs and telecom companies

The film industry in Europe is composed mainly of SMEs - the great majority of European film companies produce no more than one film a year as shown by the following table:

Country	Number of film production companies	Number of companies producing not more than 1 film	Percentage
Belgium	55	50	90%
Czech Republic	55	50	90%
Estonia	18	18	100%
Finland	30	25	83%
France	156	125	80%
Greece	100	90	90%
Italy	422	325	77%
Spain	160	130	81%
Sweden	56	52	92%
UK	217	186	85%

However, although the small size of companies may represent a weakness when looking for financing and in terms of technological knowledge, SMEs represent the most dynamic players in the market - they are open to new challenges and they can easily adapt to changing business environments.

European SMEs have no vested interest in distribution, unlike their Hollywood competitors who fear that VOD may cannibalise the lucrative revenue stream generated by DVD. Provided that the issue of production financing is addressed, European companies will be able to move quickly into the new digital market.

The challenges of VOD

A number of uncertainties still surround the emerging VOD market. The first issue to be tackled by European producers is **access to the market**. Licensing of rights is becoming key to the film industry to generate value from the catalogue, following the model which has long been proper to the music publishing industry. Negotiating rights for audiovisual content with multiple partners for different uses (VOD, pay-per-view, subscription, trailers, web-streaming etc) will become an ever bigger piece of business for producers. European companies risk being put at competitive disadvantage with large users of rights due to their size (most EU producers are SMEs) and to the novelty of the technological and legal environment.

Another important issue hampering the uptake of VOD is the impact of broadband on distribution strategies and on the **financing of films**. In particular, access to the digital distribution infrastructure is likely to put a greater pressure on the film producer to find funding for the film, as removing the rights from the traditional distributor and replacing pre-sales to TV with a business based on digital distribution will eliminate a significant part of film funding too.

Last, but not least, the question of whether to establish a specific **VOD right** for online distribution should be addressed. This VOD right should be defined at EU level as a separate right from other distribution rights, and might be endowed with an ad hoc release window.

Moreover, a deeper insight shows that the actual development of VOD in Europe mainly benefits non-European productions: US films account for 90% of content offered by European platforms². On top of this, in the absence of voluntary measures to help circulate European works, VOD in Europe remains an aggregation of national markets, more than a unified European marketplace.

The digital marketplace - the point of view of the film industry

EFCA is of the opinion that the present legal, technical and business environment is conducive to the development of digital film distribution services:

- VOD is becoming a commercial reality, and the number of platforms has grown significantly.
- The field is open to new entrants and changing fast.
- VOD libraries include a large variety of contents

However, there is currently very little revenue from online digital sales of films. One of the objectives of EFCA is to support the growth of a legitimate market and limit the impact of unauthorised activities. EFCA's priorities for a smooth and successful uptake of digital services across Europe are as follows:

An **attractive catalogue** is essential for the success of a VOD platform. Licensing of rights is key to the film industry to generate value from the catalogue. Devising a suitable licensing mechanism allowing film producers and distributors to maximise exposure and helping on-line service providers to identify right holders is a critical step towards a successful strategy for developing an effective European digital film market. Collectively, European cinema represents 25% market share in Europe - it is in fact as big as a Hollywood studio. The aim of European film companies is to reach a critical mass of content that will trigger a diverse offering on various VOD platforms.

Interoperability of services and devices is essential in order to get consumers' acceptance and foster digital roll-out. Lack of interoperability would limit competition between two or three big market players to the detriment of consumers who would be confused with incompatibility between formats and devices. Advantages of interoperability are consumers' trust, as they will be able to purchase any device they wish having the certainty

² Cfr supra

that it will be compatible with any product. For the film industry, interoperability is a key condition to favour increase of online services' revenues, as it extends the potential market.

But interoperability cannot be an argument to challenge copyright protection, by justifying for instance circumvention of technical protection measures and/or non-authorised uses of works.

Legitimate online distribution needs the **right holder's authorization** for the making available of his work to the public. The authorization can be obtained individually or collectively through collecting societies in exchange of a price. In case of individual licensing the price will be decided by the right holder on the basis of the use made of his work; and when the use of the work is authorized through a collective licence it would be for the collecting society, after a negotiation with the commercial user, to decide on the price. **Right holders should be free to decide between individual or collective management of rights.**

Price must remain a matter of commercial negotiation between right holders and users in relation to the different uses made of works. There are different possible uses of a work protected by copyright: digital delivery, communication to the public, reproduction - **each usage requires a separate licence from the right holder.**

Release windows for new productions (not for catalogue films) result from territorial exploitation of rights and the necessity for each participant to recoup its investment in the production. Release windows have to be maintained, although they can evolve in the online market. An ad hoc release window for VOD distribution should be created at EU level (it already exists in some European countries) - its place should be between video release and pay-per-view.

Piracy must be fought with all available instruments: enforcement of existing legislative framework at both European and national level, awareness-raising campaigns, educational activities. Any type of illegal activities online (uploading or downloading) is detrimental to the development of the digital marketplace. EFCA believes that the successful roll-out of VOD services will be instrumental in reducing the impact of digital piracy on the film business.

Telecom companies and ISPs also have to face their responsibilities in promoting subscription services which are mainly used for illegitimate activities. Broadband access spending is increasing throughout Europe, yet the uptake of VOD services is not as widespread as we expect it to be. Whilst consumers are charged subscription fees for their Internet access, VOD struggles to emerge essentially because it has difficulties in competing with **illegal P2P file sharing services**. This means that a business which is composed of SMEs is de facto subsidising large telecom operators and ISPs. This is unacceptable - ISPs have to remedy their current failure in policing the online market at the detriment of right holders.

DRM and private copying

DRMs are a basic instrument at the service of digital distribution. Their aim is to provide protection of content against audiovisual piracy. **It is important that DRM are not implemented unilaterally by hardware manufacturers without the agreement of the content industry.** The latter should exercise its copyright, not the former.

Interoperability of DRM systems is therefore fundamental to the future digital content markets. It helps increase customer choice and increases the willingness of consumers to adopt digital systems. Customers are reluctant to embrace DRM, perceived as affecting privacy requirement. Before embarking on a DRM roll out, consumers' surveys are needed.

DRMs are not the universal remedy. DRMs can manage remuneration attached to certain exclusive rights. However, in the absence of valid DRMs, levies remain the only alternative to remunerate right holders for the private copying exception; therefore EFCA is concerned by the plans of the EC's DG Internal Market to remove copyright levies. Right holders need both DRMs and levies. Consumers have acquired a kind of private copying

playing field they want to protect. Levies provide the opportunity to maintain the exception while DRM's provide the opportunity to exploit exclusive rights.

In recent months, levies for private copying have come under attack from an ICT industry determined to increase its own profits. Remuneration for private copying exists in 20 Member States. It represents a satisfactory mechanism for a range of stakeholders, and creates no significant extra costs for the hardware industry. Crucially, it enables consumers to make copies for private use in exchange for a legitimate top-up to the incomes of authors, performers and producers. **It is currently the only mechanism which allows creators to be compensated for the widespread copying of their works for domestic use.**

Consumers' freedom to make copies of copyright-protected content is extremely lucrative to manufacturers and importers of recording equipment and/or blank media. It is therefore entirely legitimate that the hardware industry should provide compensation to the providers of this content for the negative impact that private copying has on other sources of revenue. **EFCA believes that levies should not be phased out as envisaged by the ICT industry**, but rather coexist with DRMs to provide fair remuneration to right holders.

DRMs in their current status are used by a minority of companies and do not work well, as they can easily be evaded. EFCA takes the view that DRM are useful as a tool to monitor usage and enable the management of rights to facilitate rights trading and access to films. As long as content is paid for, DRMs should be a tool enabling to track usage and to distribute with accuracy revenues collected by the right holders - it is the wealth and diversity of the content on offer that motivates consumers to buy digital devices.

There is a serious technology understanding in the film business community that needs to be addressed - the ICT industry and ISPs cannot simply recommend the wiping out of hundred of millions of euros collected through levies on behalf of authors, performers and producers across Europe without proposing a viable and fair system in exchange. DRMs are currently not the solution.

The role of EU authorities

EFCA welcomes the Film Online Charter signed in May this year in Cannes by EU Commissioner Ms Reding and calling for the establishment of viable online services for distribution of audiovisual content. We thank Ms Reding for endorsing the basic principles underpinning the uptake of the European online film market.

However, we expect the Commission to step up its action in order to make VOD a priority in the framework of its Content Online initiative. In particular, we call on the Commission to establish support programmes that would facilitate VOD uptake and help the film industry to take hold of the opportunities offered by ICT. Our priorities are, in the following order:

1. Licensing
 - Encourage licensing of European films by rewarding attempts to establish collective licensing platforms
 - Facilitate access to European films through appropriate licensing mechanisms offered to users
 - Create scale in terms of repertoire to be licensed
 - Help European companies to get organised at pan-European level

2. Technology understanding
 - Encourage film companies, especially SMEs, to participate in the FP7 programme
 - Encourage platforms and clusters that enable a better understanding between the ICT industry and the European film community
 - Provide financing facilities for R&D activities – for instance on security or on metadata exchanges between different VOD platforms for rights management – in the framework of the 7th Research Framework Programme;

3. Fight against piracy
 - Develop an ad-hoc programme to finance fight against piracy and awareness raising campaigns at EU level

4. The regulatory framework
 - Encourage the involvement of financing institutions and of traditional and new audiovisual players (broadcasters and telecom groups) in devising appropriate measures to ensure a significant presence of European works on digital platforms, by for instance ensuring attractive presentation of European works in electronic programme guides;
 - Carry out consumer behaviour surveys in the context of the fragmented European market;

The MEDIA 2007 Programme

The market for video on demand services represents a cultural and commercial opportunity for the European film industry. The growing number of VOD services reflects the public's interest in this mode of consumption. However, the offering of European films is uneven, depending on the video on demand services provided and the countries covered.

The MEDIA 2007 programme should, as a priority, contain a specific action devoted to video on demand, intended to make available the catalogues of rights to European films, facilitating the clearing of rights, the making available (media and standardisation adapted to online distribution), availability of language versions and facilitation of upward flow of revenues.

The principal objective of the MEDIA programme is to support trans-national distribution of films – VOD is a unique opportunity to achieve what it is difficult to realise through traditional distribution channels.

Such support should enable the shortcomings in the offering on certain services and in certain language areas to continue to be corrected. Such support should be formulated so as to be an incentive for rights holders to make available European works on digital platforms.