



Public Consultation on 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.)?

EGEDA is currently working on a VOD platform called 'EGEDA Digital', which will make it possible to watch Audiovisual works from any place in the world, at a reasonable price, with a very good quality and in a safe environment, safeguarding the European Film Heritage.

EGEDA Digital will offer audiovisual works starting with a catalogue of 150 Spanish films, which will grow every year at an average of 400 to 500 films per year. In a near future we expect to be able to offer as well feature-length films, short films, and animated films from other European countries. The works itself are the same, but for their use on VOD platforms they need to be digitalized, identified and protected, after a lengthy and expensive process.

The main difference between the exploitation of audiovisual works online and offline is the possibility that VOD platforms offer to have access to the audiovisual works from any place and moment individually chosen by the user.

Another difference is in the way works are managed – collectively or individually. As a collecting society we license the public performance of audiovisual productions in Spain to cable operators on the basis of a blanket license, based on a collective licensing agreement. EGEDA Digital will work on an individual licensing system since each producer will decide on the conditions of exploitation of his/her works (streaming, temporary or permanent download) and the price. EGEDA Digital will start functioning at the end of 2006.

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.

Definition of content as provided in the introduction of the consultation seems already very extended, although the Communication should not provide a closed list of works, as any works currently existing or created in the future should benefit from the provisions of the announced Communication.

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.

The present environment is conducive.

- 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

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There is currently very little revenue from on line digital sales. One of the objectives of 'EGEDA Digital' is to support the growth of a legitimate market and limit the impact of unauthorised activities (see question 21).

Protection of content is indispensable; for this reason EGEDA Digital uses the strongest DRMs existing in the market place; nevertheless these devices are not completely efficient and they are not as strong as we expected them to be.

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. Negotiating rights for audiovisual content with multiple partners for different uses (VOD, pay-per-view, subscription, trailers, web-streaming etc) is a big 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, very often micro-enterprises) and to the novelty of the technological and legal environment. Devising a suitable licensing mechanism allowing film producers to maximise exposure and helping on-line service providers to identify right holders, like EGEDA is trying to do through EGEDA Digital, is a critical step towards a successful strategy for developing an effective European digital film market.

Interoperability is essential for having consumers' acceptance; without consumers VOD platforms will not be successful and the digital roll-out will suffer. Consumers need the certainty that they can use every product on any device, otherwise they will continue using pirated products which do not differentiate between formats or devices.

Access to broadband services is progressing rapidly, and most EU countries are today in the vicinity or above OECD average figures (and catching up) in terms of broadband access penetration.

However, **speed of networks** is not sufficient for the type of service we would like to offer - networks are still too slow to enable us offering an instantaneous visualization of audiovisual works. Speed of networks, broadband access: remote regions, countryside, where off line services are not always available, do not have broadband access with a sufficient speed for enjoying online services.

Consequently we encourage the Commission to invest strongly in ICT infrastructure (high speed broadband) which is the condition for enlarging the audiences for European content.

VAT should be further harmonised.

Intellectual property protection is not fully implemented, as broadband access still results in massive illegal up- and downloading of protected content. One priority should be to remedy to this situation at European and world-wide level. At European level, this means effective implementation of protection recognised in the various applicable European directives, in cooperation with stakeholders (telcos, ISPs, rightholders and consumers).

For payment and price systems, see question 12 & 13

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?

Currently there are two Directives whose objective is the protection of personal data and privacy - the Electronic Communication Data protection Directive (2002/58/EC) and the e-Privacy Directive (2002/58/EC). The revision procedure of the telecom package has shown that current legislation in this field needs to be adapted to new technologies.

Adequate protection of public's interests (privacy, access to information) needs to be ensured in the online environment. Balance between said public's interests and other private interests (such as intellectual property rights

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protection) seem adequate, and should be maintained. Such protection seems adequately implemented through specific monitoring & control bodies such as those represented within the “article 29 group” of Directive 95/46/CE on personal data protection, as well as consumer organisations (both at European and national level), ...

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?

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 that it will be compatible with any product. Such certainty will encourage consumers to purchase audiovisual or musical products in legal distribution chains, which guarantee good quality and fair prices.

The Directives forming part of the Telecommunication package¹ highlight the relevance of interoperability and its benefits for a healthy development of new technologies and distribution of content through digital networks. The telecom package is currently being subject to a public consultation for its future revision; what the Commission must ensure is that interoperability remains a priority in the revised regulatory framework.

Interoperability is a major concern for both consumers and right holders:

- Consumers need to be adequately informed about the exact level of interoperability between various content and devices, as content and devices are today often linked (for instance iTunes online platform and iPod devices). They also need to be recognised some possibilities of private copying that does neither challenge what was deemed acceptable in the analogue world, nor infringe copyright. Such private copy facility should in return be remunerated to the benefit of right holders.
- For audiovisual producers, 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-authorized uses of works.

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?

VOD platforms are a far-fetched tool for promoting European works, being VOD platforms an additional window in the release chain. Consumers will be able to have access to niche films which in the off-line distribution market are difficult and sometimes virtually impossible to find. The 'long tail' theory argues that, thanks to digital revolution, content is easier to make, cheaper to distribute and easier to find. The mass media becomes less important and the niche content is on the rise². Nowadays many European films are distributed through niche market channels; therefore on-line distribution channels are the best opportunity for European films to raise a broader audience than the one currently achieved.

¹ Access Directive, Electronic communication Directive, Authorisation Directive, Universal Services Directive in respect to equipment for the reception of digital television.

² Variety August 7-13, 2006

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Digital distribution represents therefore the chance for Europe to develop an international competitive distribution infrastructure enabling a better circulation of European films – as long as producers are in the condition of mastering the changes brought by the digital market.

Accessing the online environment has specific related cost: digitalization of content, storage, transcoding, editing of EPG (Electronic Program Guides). Instruments permitting sharing those related cost should be encouraged.

EGEDA asks the EC financial and regulatory support for the creation of a competitive online market.

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.

The big difference between the EU and US film industries is mainly due to two factors: the capacity of Hollywood producers and distributors to incorporate the entire film value chain in their own companies and their ability to leverage the world's largest audiovisual market in order to support export on oversea markets through a capillary distribution system. US productions have been enjoying a market share of about 70% on the European box office in the last years (2003: 71%; 2004: 70.5%; 2005: 73.2%)³.

The weaknesses:

The European film industry is highly fragmented across linguistic and national borders: these acts as a major barrier to the development of digital film services. Fragmentation must be overcome and the aggregation of European content for digital distribution has to be facilitated. A critical mass of content would attract and promote the establishment of larger European services. Licensing of rights will become key to the film industry to generate value from the catalogue.

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 to a digital network will eliminate a significant part of film funding too. The traditional financing mechanisms of film production risk being jeopardised by digital distribution – this may represent an untapped opportunity but also a threat to film producers. To address this difficulty, EGEDA funded in December 2005 Audiovisual S.G.R., a mutual guarantee society for supporting audiovisual productions; since its creation, Audiovisual SGR has approved 29 loan guarantees, for more than € 6 million.

It is essential that the EU helps the film industry (mainly composed by SMEs) getting prepared to the digital marketplace, so as to overcome the risk of reproducing the off-line oligopolistic structure on the online world.

The strengths:

Content diversity - Europe has thousands of enterprises active in audiovisual production. No other country matches the number of feature films produced in Europe - the EU 25 produced 761 films in 2004, 150 more than the US and more than double the films produced in Japan.

SMEs are likely to take more risks than the dominant players that want to stick to their revenue model – VOD will cannibalise the video sale revenues. Europeans have fewer vested interests in video distribution so they should be able to move quicker, provided the financing of production is addressed.

In theory, VOD services could facilitate access to European works that are not being released in theatres or broadcasted on TV in neighbouring countries. However, consumption of audiovisual works is mainly conditioned to

³ European Audiovisual Observatory – 2005 edition.

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marketing and promotion: therefore, although VOD services may technically enable potential access to a greater number of films, the problem remains if said films are not promoted, and therefore not raising the interest of the public in order to watch them online.

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?

Video-on-Demand (streaming or downloading) and Pay-Per-View will become either substitutes to other revenue channels or a complement to existing revenues. They might also represent an easiest way to cope with the different obstacles of the distribution sector, as far as internet's network neutrality remains and the oligopolistic situation existing in the off line world is not reproduced online.

The type of distribution of audiovisual works (streaming, download, PPV,...)through EGEDA Digital will be decided individually by each right holder. This platform will offer B2B and B2C services.

We have the intention to offer not only Spanish productions but also other European creations, however significant investment is required to do so.

First it is necessary to obtain the right holders' authorization, which is not always easy due to the lack of a registry system in many countries. For facilitating the location of right holders EGEDA created a Registry system, which is operating for years, and ARIBSAN⁴, an association created together with other collecting societies and associations, which provides the ISAN number - International Standard Audiovisual Number - for Spanish, Portuguese and Latin American territories.

Another barrier to overcome is the linguistic one, as there are 20 official languages across the EU. Due to social and cultural differences the rating systems also vary from one country to another. To overcome the first barrier while preserving language diversity, we would need adequate dubbing and subtitling mechanisms and finance to use them on a regular basis (For rating solutions please see question 24).

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

Due to recent developments in the VOD market, it is difficult to have comprehensive figures to evaluate its size. Data for 2005 and future estimations available are presented hereafter:

⁴ <http://www.aribsan.org/default.asp>

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Revenues (\$ million)	2005	est. 2010
North America	1,532	4,735
Europe	1,275	4,497
Asia Pacific	262	1,123
Latin America	128	387
Total	3,197	10,743

Source: Informa Telecoms & Media

Europe is well positioned in 2005 and estimates for 2010 place Europe as the second market for VOD services in the world. The size of the market is also significant: total volume of VOD revenues in 2005 was more than double the revenues derived from digital music sales (online and mobile), estimated at \$ 1.5 billion in the same year - if music is at the fore front of the digital revolution, film has overcome it in terms of revenue generated from new platforms.

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.

For Video-on-demand to PC via internet, the consumer uses a broadband connection and a software module loaded onto their PC to access a film catalogue from a web site. Films are either streamed or downloaded and played. Streamed films require the user to remain on line and have an available bandwidth of at least 750kbps to have a VHS quality viewing experience.

A film is transformed into the appropriate formats using encoding software in exchange of a licence. Encoding is the process of packing the content so that the resulting files are easy to store and transmit. An encoder - a piece of hardware or software that encodes the film by removing information from the signal (this tends to be high-frequency signals that can not be noticed by the human eye) - is used for this task and compressing the rest. At the other end the consumer's equipment reconstitutes the content by unpacking the content and reconstructing the picture. This would for example be a digital media player on a PC or a decoder chip in a set-top box.

Encoder software use codecs to transform the film to the desired output format (Windows Media Player, Quicktime...), these are software or hardware based compression algorithms that are either proprietary or standards⁵-based systems. Different codecs exist for the mobile and broadband platforms. In general codecs are patented; being the payment of the patent licence an additional charge to the long list of expenses required for launching a VOD platform.

Having this picture in mind, it is necessary that Member States and the EC encourage the use of standards to the extent that is strictly necessary so as to ensure interoperability of digital services and improve freedom of choice for users, otherwise consumers will get lost between formats and will be restraint from purchasing audiovisual products.

⁵ There are two main bodies doing parallel development of video compression algorithms/standards: the "H" standards, developed by ITU (International Telecommunication Union) and the "MPEG" standards, developed by the MPEG committee, and then ratified by ISO (International Standards Organization).

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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?

Our main problem is the illegitimate distribution of films online, which affect the whole distribution chain, as they are available online in p2p networks since the day of the cinematographic release. The physical distribution of audiovisual works – DVD and video tapes – is also suffering from selling of illegal copies every day on the streets of many cities in many countries, Spain being a major market for pirate products (please see question 21).

Legitimate distribution platforms for audiovisual works are emerging, yet for their successful development an attractive catalogue is essential which is not always easy to obtain due to licensing difficulties (please see question 3 & 7).

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?

EGEDA Digital will use payment by credit card and is envisaging using payment by mobile phone in a near future.

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

Price will depend on the type of licence that we will provide (streaming, temporary downloading or sale), on the type of work (film, short films, animation or documentaries) and whether they are new releases or catalogue works.

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?

Collective licensing represents a convenient way to ensure online distribution of content for European small and medium sized companies. The basic principle underpinning collective licensing, the one-stop-shop scheme, is a guarantee for users if rights to have access to a large catalogue of works without spending time and resources identifying individual right holders. Collective licensing thus lowers transaction costs and increases the economic value of rights trading.

Moreover, acting collectively individual producers are in a better negotiating position as they represent an interesting catalogue for online services. Collective licensing is especially suited to the structure of the European market which is composed of a great number of small and medium sized companies, which are not integrated into vertical structure.

Collective licensing does not imply giving up on commercial freedom - under the model developed by EGEDA, the producer remains free to decide about the works available, the price, the timing and the territory of release.

Licensing should not constitute a bottleneck to technology and new service developments – therefore the mechanism of negotiation and licence delivery should be simple and fast. A full network of reciprocal agreements ensuring clearance for the exploitation of protected works in every EU country, is essential for the good functioning of VOD platforms. The advantage is that every EU territory will be covered, as far as it ensures revenue flows back to right holders. Right holders should be free to choose the collecting society of their preference, being the collecting society located in the country where they have their economic residence the one which seems to be more convenient due to its proximity and the right holder’s familiarity with its administrative system.

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At the present the only piece of legislation existing in this field at EU level is the Recommendation on online music⁶ which is built on the right holder's option to join the collecting society of his wish for licensing his musical works online..

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?

The major problem is assessing what can be the appropriate release window for new productions, compared to pre-existing windows.

On the other hand, Film and audiovisual producers are responsible for the exploitation of the works they produce. In order to do so, the exclusive rights of the different participants have to be transferred to the producers. Existing presumption of transfer of rights should also be automatically extended to on line distribution provided the producers grant the licensors a fair share of the new revenues.

For identifying the owners of the numerous rights gathered in an audiovisual work EGEDA created a Registry of audiovisual films, which has ended up being of great help. We therefore encourage the use of registration systems in order to improve legal security – improving the licensing system- and preserve the audiovisual heritage.

In order to ensure pan European and international compatibility of audiovisual registers, metadata standardisation and the implementation of ISAN numbers -International Standard Audiovisual Number - is necessary. EGEDA, together with other societies and associations, created ARIBSAN⁷, an organisation which provides ISAN numbers for Spanish, Portuguese and Latin American Productions in order to reduce the cost of distributing audiovisual works from these countries. The ISAN number is a voluntary numbering system for the identification of audiovisual works, which provides a unique, internationally recognised and permanent reference number for each audiovisual work registered in the ISAN system. The ISAN does not vary, it remains the same regardless of the various formats in which the audiovisual work is distributed, the language or its uses. Being a number, the ISAN allows identification of works without language barriers.

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.)?

Legitimate online distribution needs the right holder's authorization for the making available of his work to the public (article 3 Directive 2001/29/EC). 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 – as is the case of right holder exploiting their works through EGEDA Digital; and when the use of the work is authorized though 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.

⁶ Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC)

⁷ <http://www.aribsan.org/default.asp>

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The remuneration for private copying is a fair compensation provided to right holders in exchange of an exception applied to the exclusive right of reproduction. The purpose of the fair compensation is to compensate right holders for the use made of their protected works – in this case their reproduction (Recital 35 Directive 2001/29/EC).

Convergence has been talked about for many years. It is yet to become reality. Most services are in their infancy and consumer acceptance is still an unknown. Multifunctional nature of equipment and media should not overshadow their recording capacity, facility that should be subject to the copyright levy. It should be remembered that the purpose of the copyright levy is to compensate for the harm caused by the copying of works on equipment and blank media subject to the levy. Therefore, the question of convergence, together with the consideration that a piece of equipment or blank medium can store material not protected by copyright, should not be the criteria used to determine the amount of the copyright levy.

Online distribution is governed by exclusive rights implemented by DRMs. This is not to be mixed with levies which compensate an exception to said exclusive rights, such as the exception for private copy. Levies have not proven to be an obstacle to the development of online services and related devices, to the contrary. Levies are actually complementary to DRM's: they legitimately compensate rightholders for usage of protected works that cannot or will not be managed or prevented through DRMs.

See our specific contribution to the public consultation on "Copyright levies in a converging world".

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.

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?

- Fiscal measures

Variation of VAT rates between online services and off-line goods & services is creating discrimination. In general, VAT rate for theatrical release and Free TV broadcasting is a reduced or even zero rate. This is also the case in some country regarding Pay TV (for which a reduced rate is applied)⁸

It is clear that the introduction of a standard (not reduced) VAT rate for VOD services tends to hamper the development of this emerging market. Alignment of said VOD services' applicable VAT rate on those applied to theatrical release and TV broadcasting should be envisaged: a systematic approach aiming at favouring consumption of cultural goods and services by reducing the VAT rate should be proposed.

- Intellectual property regime

The intellectual property regime (IPR), provided by international WIPO treaties signed by the European Union, does not constitute a barrier hampering the development of creative online services, to the contrary : IPR constitutes the

⁸ See appendix III : VAT rates applied to cultural goods, as established by the European Commission, with the following correction to be noticed for France : VAT on Pay TV is actually 5,5%, and not 19,6% as wrongly stated.

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exclusive protection benefiting to right holders and their works in order to protect their investments and patrimonial rights. IPR is therefore a key element in the protection and renewal of investments in produced protected audiovisual content. Without such produced new audiovisual content, most new online services would become pointless and unattractive to consumers.

Actual *media release window system in Spain* is regulated. To have access to subsidies it is necessary to respect the release window system, where VOD would be placed somewhere between DVD sales and Pay TV. This would have to be analysed, and the Spanish Administration still sees the theatrical screen a 'the main exploitation window' - subsidies to film producers are also related to cinema attendance.

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

The Spanish Institute of Cinematography and Audiovisual Arts (ICAA) has an incentive scheme to support independent distributors to make films available for digital distributions. To this end, the ICAA has signed an agreement with the Official Credit Institute (ICO) – a public financing institution – to give access to soft loans whose interests are partially subsidized by the ICAA, for both conventional and online distribution.

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?

The industry is still evaluating the business models and is considering the impact of VOD on existing windows of exploitation.

“Release windows” are applicable to the audiovisual industry, and especially the film industry. Below are the current release windows for DVD and Pay Per View (in months compared to theatrical release, unless otherwise specified), and the situation of the VOD release windows in various European countries.

	Video	VOD	Pay Per View
DE	6	9-10, case by case	9-12
AT	6	Like PPV	8
ES	4-6	Case by case	12
FI	6	Case by case In general DVD+90 days, sometimes 45 days or less	9
FR	6	circa 7,5 (33 weeks)	9
HU	6	-	N/A
IT	3-6	Case by case	
PO	6	-	N/A
PT	12/6	Case by case	N/A
UK	3-6	In general DVD +90 days, more and more DVD+60 days or less	8

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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

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?

Network neutrality means a state in which ISP offer interconnection services on a uniform basis. If ISP could be allowed to discriminate between network operators by offering network priority to higher-paying companies to operate faster or more predictably and ultimately become more acceptable to end users, the Internet will stop being a democratic and open network. Broadband discrimination would transfer current discriminations existing in the offline world to the online, which would be in detriment of cultural diversity and consequently of the promotion and distribution of European works.

Legal services should benefit from a more favourable treatment. They should be excluded from the quota part of the access providers' commercial offer. For example VOD legal transfer of bytes should not affect agreed authorised quota of byte's transfer.

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)?

According to a study published by the MPAA⁹, the US film industry (MPAA-affiliated studios, i.e. the Hollywood majors) lost \$ 6.1 billion to piracy in 2005, out of which \$ 1.3 billion came from piracy in the US and \$ 4.8 billion internationally, with around half of this loss occurring in Europe. For the first time in the history of the MPAA's statistics on piracy, the study also takes into account losses due to Internet piracy: the MPAA estimates that in 2005 \$ 2.4 billion were lost by studios because of purchase of illegal copies of VHS/DVD; \$ 1.4 billion were lost because of illegal copying of legitimate VHS/DVD; and \$ 2.3 billion were lost through Internet piracy (illegal downloads of films).

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?

EGEDA is a key institution in the fight against piracy in Spain, having an anti-piracy department since 1994. The steps taken have ensured that fraudulent broadcasts of audiovisual works by local television stations and cable networks have declined to practically zero. The department made preparations to fight against audiovisual piracy carried out with new technologies (internet, DVD, etc.), and has scored different successes against these new methods of committing fraud.

EGEDA has obtained many favorable sentences condemning illegal distribution of films in physical support through the internet since 2001. EGEDA pursues illegal film sales made through chats or web sites, which is different from films exchanged in p2p networks.

⁹ http://www.fact-uk.org.uk/site/media_centre/documents/2006_05_03leksumm.pdf

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In Spain the Council of Ministers approved in 2005 an Anti piracy inter-ministerial plan '*Plan Integral para la Disminución y Eliminación de las Actividades Vulneradoras de la Propiedad Intelectual*' with awareness, education, legislative and preventive measures.

We are of the opinion that any type of piracy in its strict terms, meaning the unauthorized exploitation of a protected work which conflicts with the normal exploitation of the work and unreasonable prejudices the legitimate interest of the right holder, is damaging and should be punished.

On line legal services can be a mean (but not the panacea) to fight piracy by offering the consumer best quality services.

Uploads determines downloads. Uploading is therefore to be considered as a priority in the fight against piracy, although no distinction can in principle be made between upload and download in terms of damages caused to copyright holders.

Distinction should also be made between small and big pirates, occasional downloaders and mafia networks, but such is already the case in European case law.

Cooperation with telecom operators and ISPs should be sought. Drawing on the arrangements set out in the European Charter for the Development and the Take-up of Film Online, the Commission should provide a framework of appropriate measures soon.

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?

EGEDA believes that it is first important to inform and educate consumers than only to threaten them with imprisonment and fines. This philosophy is reflected in the campaign '*No es lo mismo*' (is not the same)¹⁰, where it is stated that it is not the same to buy pirated products that originals, and the reasons why (job losses, mafias, violation of human rights, etc).

Education is one of the various dimensions of the fight against piracy and illegal file-sharing. But awareness-raising campaigns may have huge costs. A specific program could be therefore be developed at European level to support Members States and/or right holders' initiatives.

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 uncoprighted material) reveal new business models? If so, please describe them?

The P2P technology as such represents a great advance for facilitating the transfer of content through the internet, the problem is its most popular use – illegal file sharing. The distributed nature of peer-to-peer networks increases robustness in case of failures by replicating data over multiple peers, and by enabling peers to find the data without relying on a centralized index server. In the latter case, there is no single point of failure in the system, which makes the peer to peer system highly reliable.

¹⁰ <http://www.egeda.es/imagenes/banners/noeslomismo.html>

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P2P technology as such is outstanding; the problem is its generalized use to exchange protected works without providing any compensation to right holders. Thus what we need at present is to find a way to ensure revenue flows, which will allow us – content providers - to continue investing in new productions.

Peer to peer can support illegal services as well as legal services, for instance if coupled to appropriated DRMs (see recent deals between US studios and former illegal P2P file-sharing software editors, such as Bittorrent), or if used for dissemination of promotional free audiovisual content.

What is refused by producers (as well as by almost all the other right holders) is the option once proposed in some countries in order to legalise unauthorised P2P file-sharing through a legal license or any other similar form of expropriation of right holders. Such an expropriation would be in contradiction with European and international law.

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)?

Member States use different systems when rating feature films. Even within a single country, classification may vary, depending on whether the film is released theatrically, on video or DVD, or whether it is broadcasted on TV channels.

The only horizontal classification that exists in the EU is for videogames (PEGI the pan-European game information system), which was introduced in April 2003 by the ISFE¹¹. This form of classification contains two elements: age rating and content description.

According to a study carried out by KEA European Affairs in collaboration with Olsberg/SPI for the European Commission in 2003, the rating systems existing across EU countries are well entrenched in the film distribution structure - the industry is used to deal with the heterogeneity of rating systems (both across countries and across different media) and expresses no needs of reviewing the system in place. The industry also claims that there are unintended benefits to the heterogeneity in that rating requirements have the effect of preserving territory-by-territory distribution and acting as something of an obstacle to pirate copying.

However, the study also shows that the trans-border nature of the Internet itself and the growing possibility of accessing VOD services on an international basis will over time create extremely strong pressures for a more homogenous system of content rating than exists at present. The study argues that, though harmonisation of rating practice throughout Europe is very difficult to achieve, due to deep cultural and social differences amongst member states, there is definitely room for action in fostering common actions and exchanging 'good practices' towards a more uniform system of European rating practices.

This could be achieved through self-regulation, umbrella authorities (thus centralising the rating bodies and practices), educating the public on the issues of ratings (thus making personal responsibility a more viable option) and additional technical measures to enable individuals to control theirs' and others' viewing habits.

EGEDA welcomes the conclusions of the study and invites the Commission to foster initiatives aimed at contributing to the establishment of a more uniform system of rating practices across Europe.

¹¹ Interactive Software Federation of Europe

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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?

DRMs are online legal service's basic instrument. They try to adequate – although never full – protection of content against audiovisual piracy.

The use of DRMs does not necessarily mean that they work properly. From our own experience in developing a digital platform, the watermarking and fingerprinting do work, essentially for monitoring the use of a protected work. However copy protection and encryption DRMs cause more problems, either because they can be easily cracked or because they are not interoperable across platforms. Standardisation may help the acceptance of DRM and their roll out.

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?

We intend to use the best DRMs for our VOD portal, being part of our business strategy the use of strong secure DRM system to track usage, with a view to report and account royalties to EGEDA members and protect our members' works. For our members it is very important to protect their works, which are very vulnerable once digitalised and even more once they are distributed online.

One can say that legal online services are supported by robust DRMs, but these DRMs will unfortunately never enable to deter illegal transfer of files with protected content over the Internet.

27. In the sector and in the country or countries you operate in, are DRMs widely used?

The use of technological protection measures on DVDs dates from the beginning of selling this media.

The new Spanish Copyright Law provides a mechanism to survey the development of DRMs with a view to take it into consideration the level of royalties in relation to the respective hardware equipment (article 25 section 6 paragraph 4°e).

Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?

Customers are reluctant to embrace DRM, perceived as affecting privacy requirement. Before embarking on a DRM roll out consumers' surveys are needed. It is likely that interoperability will come as a strong demand from consumers. In order to ensure user friendly DRMs, consumers should be aware of the limits that a DRMs technology entails, being the price of a product dependent on the uses that the technology allows. For instance the price of a CD with no copy protection measures should not be the same as the price of a CD that can only be copied 3 times. If consumers are warned of these limitations, they will have the necessary information to choose the product and, at the same time, its facilities.

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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?

In the audiovisual sector copy protection measures have been used since the beginning of the DVD. EGEDA Digital uses DRMs to avoid second generation copies, consequently our customers will be able to make one copy of the work downloaded but they will not be able to make a second copy.

29. Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability?

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. Successful interoperability is a situation where services and devices from different providers work together to ensure there are no security compromises in the DRM and Technical Protection Systems (TPS) and that the level of functionality stays the same.

DRMs are not the universal panacea. As DRMs can manage remuneration attached to certain exclusive rights, levies are the only appropriate possibility to remunerate exceptions. Right holders need both. It is not and it will never be a black and white situation. 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.

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?

Digital libraries offering films which are in the public domain could provide a great offer to consumers interested in such works.

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.)?

Consumers need equipment for visualising audiovisual works. In addition consumers' equipment must be equipped with codecs, so as to be able to read the content of a DVD or a CD. Codecs are a device or a computer programme used for encoding and decoding material on a digital stream or signal. This means that software manufacturers are already doing their business by licensing the Codecs necessities for having access to content. Consequently equipment and software manufacturers are already taking full advantage of the distribution of content online.

Manufacturers have already cynically taken real advantages from broadband development and accompanying illegal file downloading habits. This goes both for European and non European manufacturers, but the case of Philips (which sold its content providing affiliate Polygram in order to develop goods benefiting from illegal file sharing such as CD burners or DivX compatible DVD players) is well known.

For the rest, manufacturers have different approaches (see our comments under Question 14 above), but it is difficult to see were the specificity of European manufacturers could lie. All of them are taking full advantage and benefit from existing private copying exceptions in Europe by introducing new media and devices dedicated to private copy. Some of them, mostly non-European, are launching on line services which support the selling of their proprietary devices

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(Apple, and lately Microsoft; same deals also exist – but based on non-exclusive terms – between European-based companies such as Archos for electronic goods and Canalplay for online content platforms).

They now want to increase even more their revenues by convincing the European Commission to implement a phasing out of the existing private copy levies (which they allege are an obstacle to DRMs and online services).

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.)?

Governments should provide more national support policies for the development of digital platforms, including the whole process from digitalisation to marketing campaigns. The involvement of financing institutions is relevant; in this context EGEDA is playing a relevant role through the foundation of Audiovisual S.G.R. a mutual guarantee society (see question 15).

National and local authorities shall ensure that European works created by their nationals are distributed in traditional and new audiovisual networks.

Public authorities need to change the rules on window release system so as to introduce the distribution of content online to a stage of the distribution chain that will provide significant economic benefits.

Development of fast broadband networks is as essential as ensuring the production of European content. It should continue to be encouraged if focussed on enabling some categories of the European population to access legal online content. There should be a clear support from national and regional administrations to both promote legal online content implement policies enabling to tackle appropriately with illegal offers (see Question 21 above). Awareness-raising campaigns against illegal offers and piracy could also be developed at European level in cooperation with said national and regional administrations (see Question 22 above).

Public authorities should maintain a balance between the different stakeholders and prepare a playing field where new entrants could be welcomed.

Content production needs adequate financing. As a reminder, private copy levies – which are more and more explicitly challenged by the European Commission – brings about 300 Million Euros per year to the audiovisual industries. Instead of supporting the “phasing out” of the levies, Public authorities at national and European level should enforce the market to develop a fair revenue sharing system between the manufacturers, the operators and the content providers. Through DRMs and levies.

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?

At a European level, several factors may help the film industry to take hold of the opportunities offered by ICT:

- Targeted EU support policies;
- 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;
- Ensuring the revenue stream for creators, being the content industry essential for the digital economy.

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- 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 Framework Programme.
- Carry out consumer behaviour surveys in the context of the fragmented European market
- Encouraging platforms that cluster technology companies with content companies
- Preservation of interoperability relevance in the revised Telecommunication package¹², being interoperability and its benefits crucial for a healthy development of new technologies and distribution of content through digital networks;
- Maintenance of the internet's democracy by warranting network neutrality;
- Providing high speed broad band access to a great number of households;
- Ensuring adequate implementation of the Enforcement Directive for the protection of IPRs.

The market for video on demand services represents a cultural and commercial opportunity for the European film industry. The growing number of video on demand 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 programme 2007-2013 should 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.

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.

In parallel, developing an *ad hoc* program to finance fight against piracy and awareness-raising campaigns should be put up at European level.

Finally, terminating pending debate opposing levies and DRMs could only contribute to a more constructive cooperation between creative industries and IT industries in order to develop content online.

Miguel Angel Benzal
Director General

¹² Access Directive, Electronic communication Directive, Authorisation Directive, Universal Services Directive in respect to equipment for the reception of digital television.

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