



International Federation of Film Producers Associations

October 13, 2006

**SUBMISSION IN RESPONSE TO THE  
COMMISSION'S PUBLIC CONSULTATION ON  
CONTENT ONLINE IN THE SINGLE MARKET**

The International Federation of Film Producers Associations is a trade organisation dedicated to the defence and promotion of the legal, economic and creative interests of film and audiovisual producers throughout the world.

FIAPF members are 25 national producers' organisations from 23 countries across the globe, from Europe, India and China to Japan, North America, Latin America.

Put together, the creative output of the production companies in FIAPF's member organisations represents the majority of all theatrical feature films made each year in the world, and a fast growing proportion of all television programming.

**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.)?**

The members of FIAPF are involved in the production of cinematographic works and television programs which are translated in various formats in traditional media:

- theatrical release
- physical carriers (DVDs)
- broadcasts

as well as in new media platforms, in particular Video-on-demand (VOD) and electronic Sell-Thru (EST) services.

Although most of the content offered on-line is also offered off-line (e.g. on DVD), specific on-line versions and new content produced specifically for on-line distribution are also being developed.

**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.**

FIAPF believes that the scope of the future Communication is comprehensive.

**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.**

As to the legal and contractual environment, the on-line delivery of films faces a number of challenges:

- Difficulty in defining categories of rights of exploitation in new on-demand platforms. These new media rights are often bundled with other rights, jeopardizing future revenues from the exploitation of those rights.
- Bundling of new media rights with primary rights of audiovisual content will potentially create excessive concentration in the content supply market, thus affecting the availability of quality content that can help sustain / grow new services.

As to technology:

- More cooperation is needed between content providers and access providers on DRM's organization so as to create a consumer-friendly environment that takes into account the needs of rightsholders.

As to the business environment:

- Lack of certitude on future business models for new services:
- Ultimately , difficulty to attract investment into new services due to the lack of certitude of business models

**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?**

FIAPF believes that there is no systematic conflict between consumer interests (e.g. protection of privacy, access to information, etc.) and business interests (e.g. copyright, enforcement, etc.). For example, DRMs enable copyright owners to make licensed content available to consumers in very diverse models at different price points (premium content, on-demand, subscription, one copy or several copies) and/or on new delivery forms or formats (e.g. next-generation DVDs).

**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?**

The main driver for the IVF members is to meet consumer needs and demands. It goes without saying that it is in the interest also of right holders that their content may be enjoyed in as many different forms and on as many different types of equipment as possible.

However, the topic of "interoperability" often confuses concerns that not all devices will accommodate all types of content in all forms and/or formats with concerns about the scope of copyright exceptions and whether copyright content protected by technological measures and offered to consumers can be accessed by consumers when and where copyright exceptions allow certain uses that would otherwise be considered copyright infringements. As always, the relationship between copyright

exceptions and the legal protection of technological measures gives rise to much controversy, despite the fact that the Copyright Directive, upon much reflection by the Member States and the European Parliament, provides a balanced mechanism to deal with this issue.

**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?**

FIAPF's producers members are aware of the difficulties faced in the dissemination of European audiovisual works in the European Union. Those difficulties are mainly generated by linguistic and cultural diversities.

In some European countries, the AGICOA (Association of International Collective Management of Audiovisual Works) recently noticed that the offer of foreign channels by cable and satellite operators has been decreasing.

One can legitimately wonder about the spontaneous and natural demand from the consumers to access other European countries' programmes. However, the film producers would optimistically consider the opportunities offered by the new platforms for the online distribution of various European films under one prerequisite.

The independent producers – who are the main providers of diversified cultural contents – must have access to the platforms that disseminate films across borders. However, the current regimes for negotiating so-called 'new' media rights imply that those rights remain the exclusive property of the terrestrial broadcaster who commissioned the film or the series. That concentration of rights is very much detrimental a diversified offer.

The European audiovisual producers took repeated stands, stressing this difficulty within the framework of the revision of the Television Without Frontiers directive.

**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 European movie industry reflects the cultural and linguistic diversity we enjoy in this region of the world. It is both a strength and a weakness. To the difference of what may exist for instance in the US, Europe is not yet a single market for the circulation of intellectual property but rather the addition of twenty-five markets. This would justify the need to implement new support schemes for the marketing and promotion of the European movies through the MEDIA program.

FIAPF takes the opportunity of this questionnaire to welcome the initiative of the European Commission to launch a study on the needs and practice of the European audiovisual industry in respect of dubbing and subtitling, in view of formulating recommendations on measures that could taken at European level to improve cultural diversity and to lower barriers for European audiovisual productions being distributed internationally.

**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?**

Producers companies are willing to use all the services/ platforms of online content distribution to disseminate their content on the largest possible geographical scale.

Under the prerequisite that the independent producers retain the so-called secondary rights on the films and programs in order to make them available to the new platforms, FIAPF sees no major impediment for European programmes and formats to be fully exploited internationally and across related media.

FIAPF would like to recall David Graham and Associates Limited's\* opinion that:

*Broadcaster-owned producers might be less likely to sell repeat rights on the open market – being more concerned to protect the share and reach of their broadcast assets – and might be less focused on developing programmes with international and multimedia exploitation value, being primarily concerned with the interests of their own channel's*

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

According to Broadband Digital Movies, a new report published by Screen Digest, 2006 will be a watershed year for the digital distribution of movies using open Internet video-on-demand (VoD) technology. Screen Digest predicts that the first signs of recognisable growth in this market will appear in the 2006-2007 timeframe, with total consumer spending on European movie downloading and streaming services accelerating post-2008 to near Euro690m by end 2010, compared to less than Euro10m in 2005.

In comparison, European consumers spent approximately EUR 12 billion on video software on physical carriers in 2005.

**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.**

Efficient online distribution is dependent on accelerated deployment of robust DRM technologies in the marketplace. In particular, steps need to be taken to improve the security environment by addressing gaps in protection, such as the unauthorized re-transmission of unencrypted over-the-air digital television signal, improvement of the tamper-resistance of software-enabled DRMs and the protection of analogue interfaces on consumer electronics equipment (i.e. to plug the analogue hole whereby protected digital content could be stripped of its associated usage rights by converting to analogue format and then back to digital).

The Commission could play an important role in encouraging and supporting inter-industry work currently being carried out in various fora and aimed at finding robust "content interoperability" solutions for a secure digital environment (e.g. within DVB, DLNA, Coral).

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\* Impact study on Distribution and Production of TV Programmes Provided for Under Article 25(a) of the TV Without Frontiers Directive – by David Graham and Associates Limited (2005)

**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?**

The main challenge for the film industry in securing revenue streams is the steady erosion of investment returns in copyright works due to the effects of digital piracy. This simply means that less capital is available for investment in the production of new films.

Fighting digital piracy requires a commitment by public authorities to address the main sources of pirated content (e.g. camcording in cinemas, unauthorised redistribution and making available of works over the Internet, circumvention of technological measures, etc.). This requires public outreach and improved enforcement mechanisms that are credible and deterrent, as well as further incentives for network/service providers to cooperate with copyright owners to address piracy on the Internet.

Quoting CEIPI , FIAPF is also of the view that the issue of secondary rights retention by independent producers is a key point. *The financial health of European production companies remains weak, greatly because in most Member States (with the exception of the UK and France) independent production companies have not been able to retain and exploit the secondary rights over their productions.*

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

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

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

**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?**

FIAPF believes this question is more appropriately answered by companies directly applying payment systems. As a matter of general comment, thought, the development of secure, interoperable standards and efficient and secure micro payments systems should be encouraged and promoted.

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

The pricing systems and/or strategies are developed by the individual players involved in offering copyright content to end-users.

As is it crucial for the content sector to continue to innovate and ensure a fair return on investment, the FIAPF and its members strongly warn against any form of market intervention (e.g. compulsory licenses, additional limitations on the rights of copyright holders), which would only hinder content creators in ensuring an appropriate return on investment. Such interventions also raise legal questions at the EU and international levels. Pricing and strategy decisions should always be market-driven.

**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?**

**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?**

While in the context of the present EU consultation, this question relates only to on-line services we consider the same response is applicable as currently applies to other methods of delivery, e.g. cinema, broadcast, for the output of creative businesses.

Financial return to creative businesses for access to their works, in physical or other forms is entirely dependent on the promotion of consumer awareness, freedom of pricing/licensing terms, the widest available means of authorised distribution, delivery or access - and legal regimes that adequately support pursuit of un-authorised use.

Consumers have shown considerable ability and interest in obtaining on-line access to content, at a time and place of their choosing, whether once only, many times, streamed, down-loaded or for purchase in physical or digital form.

But to imply that multi-territory licensing in the on-line market-place would deliver new benefits to creative businesses is both misleading and misconceived.

It is misleading, if it supposes creation of a greater (legal) market, so implying financial benefit to rights holders. It is misconceived if it fails to recognize that imposing an intermediary 'clearing' body between the producer and consumers adds to distribution costs.

A (third party) distributor may often be better placed to increase market awareness for specific creative works. But rights holders (not legislation) should determine whether to additionally license the same entities for national, Europe-wide or multi-territory on-line distribution.

Only rights holders can establish clearances, sometimes specific to individual territories or uses (whether or not part of a multi-territory contract), for which they may often remain responsible. Related costs need to be balanced against the value of increased business, in turn dependent on ever wider access for consumers.

FIAPF maintains the same view in respect to 'remuneration' – understood as the rights holders expectation to income from freely negotiated licensing terms (i.e. not an imposed 'compensation', decided by a party other than the rights holder), often varying by market, territory or (language) region.

Creative businesses alone can determine the market for their works, deciding on effective marketing and distribution to achieve widest consumer access, with licensing (pricing) set at levels best perceived to encourage demand.

That these interests require increased (legal) delivery and redress against improper use of their works or interference with appropriate technical or management (TPM / DRM) access controls - all protected by internationally-recognized legislation - is not in dispute.

However, we see no justification or benefit to imposition of Europe-wide or multi-territory on-line licensing and clearance, proposals which could add to rather than reduce market difficulties, so failing to generate increased supply or deliver wider legal access by consumers to the product of creative businesses.

**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.)?**

The basis for right holders' remuneration should continue to be contractual negotiations conducted between the copyright holder and the copyright user, except of course in the limited cases where collective licensing is required by law (e.g. cable retransmission, as per the EU's 1993 "Cable and Satellite" Directive).

FIAPF wishes to take this opportunity to make some general remarks on the matter of private copy levies.

The starting point for any examination of private copy levies must be the language of Article 5.2(b) of the Copyright Directive:

"reproductions on any medium by a natural person for private use and for ends that are neither directly or indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures . . . "

It is imperative to recognize that private copying is an exception to an otherwise exclusive right – private copying is not, as advocated by some groups, a right in itself. Thus, a correct definition of the scope of the private copy exception in the national implementation of Article 5.2(b) is required, including a reference to the principle of legal source/access (exception only available when source/access is legal) as well as strict adherence to the three-step test set out in Article 5.5 of the Copyright Directive.

Another crucial element is that appropriate legal protection for technological measures as required by Article 6 of the Copyright Directive must be made available under national law. Appropriate legal protection includes protection for access and copy controls, prohibition of acts of circumvention and preparatory acts of circumvention accompanied by effective sanctions.

**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?**

As a general remark, FIAPF wishes to stress that the intellectual property regime must not be considered as an 'obstacle' to the development of creative online content and services but as a guarantee for the production of works.

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

The Cannes 2006 “European Charter for the Development and Take-up of Film Online” constitutes a first important step towards improved cooperation between content owners and access and network providers. The next step is the development of wider-ranging inter-industry codes of conduct, or appropriate legislation to address piracy, encouraging the further development of new services in a secure, consumer-friendly environment.

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

Release windows are an important characteristic of the film industry. They are the result of the territoriality of the rights and the necessity for each investor financing a film to recoup his investment.

The strategies of distribution and marketing territorially elaborated (on a country or linguistic area basis) are deciding factors to draw the consumers’ interest as well as on films from other European countries and to increase the interest and market value for those films.

Therefore contractual freedom to agree release windows between right holders is fundamental under copyright; it protects the individual right holders and benefits the industry as a whole by permitting maximisation of revenue from each independent distribution channel, in turn to be reinvested in future production and distribution. Contractual freedom also permits right holders to continue to take account of local cultural factors determining the optimal release of an audiovisual work in the different distribution channels.

Although the theatrical release still offers an irreplaceable exposure for a film and represents an important source of income for the rightholders (for instance, the French film ‘Palais Royal’ realised 2.5 million admissions for only 18000 legitimate downloads), the need for flexibility in the choice of how and when to release a film increases even further in the on-line environment, especially to continue to ensure the optimal exploitation in any given market.

**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?**

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

FIAPF would like to comment that to the distinction between uploading and downloading is becoming less and less meaningful in view of the development of file-sharing technologies whereby users, while



downloading a file, are simultaneously uploading the parts of the given file that have already been downloaded to their computers. Indeed, many of these systems require users to make files available in return for accessing the files of others. Legislation should provide stronger penalties and provide the means to bring actions against the entity/person that first made the illegal copy of a copyright work available online.

**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?**

Cinema festivals, where films are premiered could be an attractive source of counterfeiting for unscrupulous camcorders.

Therefore, FIAPF, which one of the missions is to monitor and control international film festivals quality standards, sets forth the obligation for the accredited festivals to make public announcements before each screening – in the official languages of the Festival - to inform the audience that recording sound, taking pictures or filming during the screening is strictly forbidden.

For several months, FIAPF has also been encouraging the festivals to screen short films related to piracy issue (for example: Locarno, Namur, Berlin; Montreal...). The objective is to sensitize the cinema goers against piracy. The message itself is tailored to accommodate the social and cultural particularities of the county where the festival takes place.

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

Provided the content exchanged is legally sourced, P2P technology in itself is of great interest to the film sector as an efficient means of content distribution as digital movie files are generally very large. Thus, the speed and bandwidth efficiency provided by P2P technology can help ensure that the downloading time of a legitimately acquired movie file is kept at a speed ensuring a high level of consumer satisfaction.

The use of P2P technology in the legitimate online marketplace for film and audiovisual content delivery has already started (BitTorrent in the United States, and the "In2movies" service in certain German-speaking territories in Europe).

**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)?**

FIAPF believes that while some basic regulatory provisions are necessary (e.g. on pornography and illegal content), the EU audiovisual industry has been most responsible in setting up voluntary rating schemes, codes of conduct, through adopting watersheds and where necessary encrypting programming. It therefore does not see the merits of either suggesting a tightening of regulation or European harmonisation in this area.

**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?**

DRM technology have been used by the audiovisual industry since the market introduction some 10 years ago of the DVD format (copy-protection technology applied). In the new network distribution models, including over the Internet, DRM technology continues to play a central role in offering consumers the ability to enjoy content when and where they want and to pay only for what they want to receive.

The key to providing consumers greater choice in their use of copyright works is enabling copyright owners to effectively exercise and protect their rights in copyright works through constructive management of their exclusive rights in the online environment. Effective DRMs are needed to ensure secure exploitation of works, recovery of related investment, and deployment of new business models.

**26. Do you have access to robust DRM systems providing what you consider to be an appropriate level of protection? If not, what is the reason for that? What are the consequences for you of not having access to a robust DRM system?**

**27. In the sector and in the country or countries you operate in, are DRMs widely used? Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?**

**28. Do you use copy protection measures? To what extent is such copy protection accepted by others in the sector and in the country or countries you operate in?**

As mentioned above, DRMs are widely used by the film industry, notably to support DVD distribution and the new online distribution services that allow copyright owners to make content available to consumers in innovative ways involving extensive product and services diversification.

Hence, it is by facilitating the legitimate provision of copyright content to consumers that DRMs and technological protection measures help strike a fair balance between ensuring right holder remuneration and meeting consumer expectations in the digital environment.

We would argue that copyright holders and consumers have converging objectives, with right holders having a clear market incentive to satisfy effective demand for flexible pricing and innovative means of consumption, whereas consumers are expecting a diversified menu of choices. Improvements of user-friendliness are being made to ensure that consumers are fully aware of the exact usage rights – defined in the DRM tool or by the technological protection measure – associated with a particular piece of content.

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

**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?**

The members of FIAPF fully support the overall public policy objective of preserving Europe's rich and diverse cultural heritage and facilitating the appreciation thereof by European citizens. As producers of audiovisual and cinematographic works, our members understand the value to the industry and society at large of preserving and providing access to this highly valuable component of Europe's cultural heritage. Our members continue to contribute to this important process by participation in both mandatory and voluntary deposit schemes at national level, which, coupled with individual agreements with libraries and film archives, provide the necessary framework for the subsequent preservation of the deposited materials and establish the terms and conditions under which the deposited materials may be made accessible to the public for research and cultural purposes.

Thus, while rich and diverse creative content contributes much to society and to the quality of life of European citizens, it is also a business and the livelihood of European creators, producers and distributors. The European content sectors play a vital role in ensuring that creators can make their works widely available and be justly compensated for their work. European content sectors also ensure that consumers and citizens throughout Europe have access to a wide range of creative products and media services.

Taken into account that very few films are in the public domain. The remuneration of rights holders for protected works, even in archives, allows to keep financing new production. Public policies aimed at enhancing Europe's cultural heritage should therefore not jeopardize investment in the creative works and services which constitute Europe's digital future. Any future policy initiatives in this area must take full account of the international copyright treaties and the *acquis communautaire*, so that any digitisation, making available and preservation of Europe's cultural content takes place in full respect of copyright and related rights.

**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.)?**

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

Public authorities have an important role in encouraging the uptake of such new services, in removing obstacles to the migration to legal delivery services, and in promoting dialogue between rights-holders, service and network providers. A high level of cooperation between content providers and access providers is a key component in addressing intellectual property theft.

**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?**

FIAPF's members would suggest the following actions :

- to ensure better implementation and enforcement of single market rules in an enlarged EU. And in particular to ensure proper application of its legal foundation which must include deterrence against

intellectual property crime and online infringements while encouraging the emergence of new, consumer-friendly on-line opportunities;

- to take concrete steps to push for the translation of the "European Charter for the Development and Take-up of Film Online" into robust inter-industry codes of conduct that encourage the emergence of new services in a secure, consumer-friendly environment.

- to play a role in securing means to enforce compliance with DRM standards, regardless of whether these are of an open or a proprietary nature. While it is true that the legal protection of technological measures granted by the EU Copyright Directive as well as contractual terms related to technological licensing are possible avenues for enforcing compliance with a given system, in certain cases this will not be enough. It will not be sufficient, for example, in cases where there is no so-called "licensing hook", or where a particular technological measure is not circumvented, but security is nevertheless compromised by a non-compliant device. In such cases, the Commission (or other public authorities) may have to step in and ensure a means of enforcement or the goal of secure interoperability will not be met.

FIAPF remains at the Commission's disposal for further information where necessary.

October 13, 2006