

**RESPONSE OF MICROSOFT TO THE
EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON
CONTENT ONLINE IN THE SINGLE MARKET**

October 2006

Microsoft welcomes the opportunity to express its views on the European Commission's consultation on the creation and distribution of creative content online, at a time when promotion of the innovation necessary to deliver such works and services is among the Community's highest priorities.

Microsoft Europe, Middle East and Africa (EMEA) encompasses more than 60 local offices, employs more than 13,000 people, and delivers software-related products and services in more than 138 countries across the region. Much of its business activity is across intra-EU borders. Microsoft offers creative content and services both offline and online. Microsoft is also the developer of many of the technologies and devices widely used for the delivery and enjoyment of online content, including Microsoft Windows and Windows Media Player, Windows Media Digital Rights Management (WMDRM), Windows Mobile, the Xbox, and Microsoft TV products.

Our response focuses primarily on the core need to protect and promote the intellectual property underlying both content and technology. These are the principal drivers of online content and services. Robust intellectual property laws, protection for rights-management technologies, cost-efficient and speedy enforcement procedures and remedies, and market-driven innovation that is responsive to consumer demand, are the critical factors supporting Europe's creativity and innovation as it faces increasing competition from all over the world.

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.)?

The creative content and services that Microsoft offers online can be summarised as follows:

- **MSN online service.** MSN provides personal communications services, such as e-mail and instant messaging, and information services such as MSN Search and the MSN portals and channels, all over the world. MSN manages many of its own properties, and works with third-party content providers to provide other MSN 'channels'. MSN provides a variety of premium subscription services, including MSN Music and other paid web services (including MSN Internet Software Subscription, MSN Hotmail Plus, MSN Bill Pay, MSN Radio Plus), as well as MSN Mobile services. MSN related sites are among the most popular on the Internet, visited by more than 465 million unique visitors per month.
- **Xbox Live service.** In addition to the Xbox video game console system and software games for the console and personal computer, Microsoft offers the Xbox Live service that allows customers to participate in the video gaming experience with other subscribers online.
- **Consumer products.** Microsoft's Encarta line of encyclopaedias, atlases and other learning products are offered in both offline and online versions.
- **Software services.** Other content-related services that Microsoft delivers online include periodic software product updates, Microsoft Developer Networks (MSDN) subscription content and updates, and small business management services. We do see a trend towards the offering of all kind of software-based services online,

supported either by advertising or subscription fees, and have begun to roll-out services of this kind for both businesses and consumers, such as Windows Live, Outlook Live and Office Live Meeting.

In general terms, the online products and services are specially designed to take advantage of multi-user, real-time, interactive and user-customised features that offline products not could support as extensively without such connectivity.

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.

The principles of the European Charter on Film Online¹ are largely applicable to the development, promotion and distribution of all types of content online, whether film, music, text-based offerings, business or entertainment software, or other works. The online market is one that has been and should continue to be largely built by the private sector, with adequate legal mechanisms and government support for protecting intellectual property.

The principles outlined in the Film Online charter are the ones on which the Commission should focus in its communication on online content with respect to other protected works. These are the promotion of (1) cooperation between service providers and content providers to improve the availability of content online; (2) education and awareness to increase respect for copyright in order to secure the sustainable availability of content; and (3) cooperation to fight piracy.

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 legal and business framework is for the most part well suited to promote the roll-out and use of creative content online. Overwhelming consumer demand for internet services provides ample capital and incentive to improve the communications infrastructure. Online payment systems are well established. Online services provide a much wider variety of market-based usage options than their offline counterparts.

Intellectual property (IP) rights and enforcement are the *sine qua non* of a vibrant market in online content and services. As in the offline world, IP rights give creators and innovators the market-based incentives and rewards to develop, disseminate and re-invest in new works and services. Interference with these rights, through inappropriate exceptions to protection or non-market pricing rules, or inadequate enforcement rules or practices, simply undermines the needed incentives and rewards.

Security of networks, payment systems and services is also vital. The continued success of the internet is highly dependent on the confidence that individuals, businesses and governments have that they are safe from thieves, hackers and spies. This requires secure technology. Microsoft makes security one of its highest priorities in developing products and services and also enables others to provide security-related products and services that work with our products. Vigilance, awareness, and visible prosecution of lawbreakers are also necessary components of maintaining robust security.

¹ http://ec.europa.eu/comm/avpolicy/docs/other_actions/film_online_en.pdf.

Mandated interoperability has been raised in France as a solution to concerns about limitations DRM technology may place on the transferability of music purchased online between different devices. Mandating interoperability by regulation or legislation is not the answer to complex issues such as this one. Robust competition between DRM-enabled services, along with light regulatory regimes that encourage cooperation between makers of DRM systems, are the most effective ways governments can encourage greater interoperability. Any interoperability efforts must respect the inherent right of creators of music, films and other content providers to determine how and to whom to distribute a work. Unwarranted regulation violates creators' rights under EU and international law, and removes incentives to create and improve DRM.

Consumer choice and industry-led co-operation, rather than regulation, should be left to work to promote a rich digital marketplace that includes interoperability options. As the online content industry continues to mature, we expect that the concerns about the user experience raised in France and elsewhere will be addressed by healthy competition between different innovative offerings that respond to customer desires, including requests for compatibility, interoperability, and ease of use.

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?

There is due regard for the public interest already built into a whole range of Community and national regulation applicable to the online environment, including in data protection, consumer protection, competition, telecommunication and intellectual property legislation. We do not believe that substantive law changes are needed in these important areas.

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?

This is a competitive, not a regulatory, consideration for digital service providers and consumers. For example, Microsoft's Windows Media DRM is the most widely implemented and interoperable system for digital content in the world. Microsoft licenses this technology widely for use in all kinds of products and services. However, some consumers seem to value simplicity or other features over flexibility, as witnessed by the success of 'end-to-end solutions' in the marketplace.

Online content is delivered pursuant to the market bargains struck between content and service providers and consumers. The bargains struck determine which content, device and copying options are provided and purchased. If a consumer does not like a particular offer, he or she simply can purchase another device or service. There is no reason for the law to interfere with such market-based bargains, and legislation to do so through interference with the DRM technology likely violates Community and international law, as described above.

So long as the market-driven bargains between consumer and provider are clear as to what device, copying and other options the user is buying—such transparency is required under consumer protection laws already—governments should support and not interfere with such bargains or the underlying DRM technology that enables them. Consumers should be left free to accept any particular offer or go elsewhere.

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?

The internet already provides an unprecedented way for content of every type, from every country and culture, and in every language, to be made available to nearly one billion people globally. When compared to the cost of producing and distributing offline content, the affordability of internet distribution means that much more content, and much more *diverse* content, will be made available than ever before. This provides a *supply* of online content that is virtually unlimited; it remains entirely up to the consumer, however, as to whether he or she *accesses* any particular content or not.

As the Commission has largely recognised, the traditional mechanisms used in the closed, limited spectrum, 'push' services of traditional broadcasting to restrict supply of any particular content (i.e. to require that it not exceed a particular percentage) in order to promote linguistic diversity, are simply inapplicable online:²

- 'In the end, consumer demand will determine whether providers of non-linear audiovisual media services will want to offer more local and regional content.'
- 'Given the different nature of non-linear services, and the differing degrees of user control, the European Commission has from the outset made it clear that "content quotas" for these services are certainly not the right instrument to achieve cultural diversity, and could even be counter-productive.'

Forms of supply-side restrictions or mandates for online content are not advisable, as these tools can neither have any substantial effect on the overall percentage of 'diverse' content available to a consumer, nor make any difference in the percentage of such content that a consumer will actually access, in a world of virtually unlimited spectrum, unlimited supply of content and on-demand 'pull' access. Any support for linguistic diversity would need to be focussed at the content-creation stage so that material is developed that consumers will actually want to buy or access, and on marketing that content well so that consumers will know about and be encouraged to access it. Policy tools like investment tax credits might be appropriate to encourage such activities.

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.

After an initial head start in the US, there are now more than 130 online music services in Europe, which is competitive with all regions of the world.³ Microsoft itself offers its MSN Music service in more than 13 European countries. On-line film services are still in their infancy, with the US having a slight head start. Recent announcements by both Amazon and iTunes of major film download services in the US should spark major growth in this area, with similar announcements to be expected in Europe. Many online games and other online content are already available in Europe.

Europe has creative talent and innovative technology and communications expertise that rival any in the world. Its legislative infrastructure has a few gaps—private copying and levies regimes in many copyright laws, fragmented and expensive patent protection, uneven legal protection of digital rights management (DRM), enforcement rules that can be cumbersome in the digital realm, as described below—that ultimately may weaken its competitiveness vis-à-vis up-and-coming economies such as China, which has begun to take intellectual property very seriously.

² The Commission Proposal for a Modernisation of the Television without Frontiers Directive: Frequently Asked Questions, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/208&format=HTML&aged=0&language=EN&guiLanguage=en>.

³ <http://www.pro-music.org/musiconline/tracker-region-europe.htm>.

The proliferation of technologies that enable authors to create, package and distribute online content of unique cultural importance portends an expansion in the reach of the European content industry. Technologies such as Windows DRM enable creators to develop DRM-enabled businesses that provide direct compensation for content. Technologies such as the Creative Commons downloadable plug-in for Microsoft Office facilitate alternative models of distributing content. The adoption of such new technologies will enable the European content industry to expand its reach and its competitiveness.

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?

Microsoft's current online offerings and plans are described above. We do believe that libraries, educational services and virtual communities all have tremendous potential in the online environment. Many of these are and will be available globally. Some, by virtue of language differences, and local culture and preferences, will continue to be offered on a country-by-country basis.

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

- The online music business in the EU and US alone is expected to grow from approximately €246 million in 2004 to €1.86 billion in 2008.⁴
- Online games are expected to grow from a \$548 million to a \$4.09 billion business in Europe, the Middle East and Africa between 2004 and 2008.⁵
- Online film revenues are predicted to grow from an estimated \$11.7 million in 2004 to \$976.5 million in 2010.⁶
- Web-based 'software as a service' offerings are projected to grow from \$4.2 billion in 2004 to \$10.7 billion in 2009.⁷

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.

We do not see technical barriers in any of these areas that would impede the continued, efficient development and distribution of online content.

⁴ Rightscom, DRM and Services in Europe and the USA (2005).

⁵ OECD, Digital Broadband Content: The Online Computer and Video Game Industry (2005), at 10, <http://www.oecd.org/dataoecd/19/5/34884414.pdf#search=%22%20site%3Awww.oecd.org%20OEC%20digital%20content%20and%20video%20games%202004%22>.

⁶ Informa Media and Telecoms, Film on the Internet (2005), reported at <http://www.informamedia.com/itmgcontent/imed/pressreleases/articles/20017296238.html>.

⁷ IDC, Worldwide and U.S. Software as a Service 2005-2009 Forecast and Analysis: Adoption for the Alternative Delivery Model Continues (2005), reported at <http://www.idc.com/getdoc.jsp?containerId=prUS00137905>.

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?

We see very few difficulties for securing revenue streams for online content. Legislation and levy systems must be structured so as to not interfere with the private bargain DRM enables between content providers and the market. Collecting societies will need to refocus their efforts from levied products to helping solve collective licensing barriers to the launch of new Pan-European products. The recent action of the European Commission that makes legally binding the commitments given by music publishers and European collecting societies on Central Licensing Agreements is an important step in this direction. And, importantly, effective enforcement regimes are key to ensuring piracy does not destroy or prevent the development of successful legitimate markets.

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?

Until recently, credit and bank cards have provided the only workable system for consumers to pay for online content. This has worked well for consumers that are adults and own such a card, and in countries where credit or bank card use is widespread, such as the UK where more than 70% of adults have at least one such card.⁸

Online services have been expanding their offerings and diversifying their payment options over the past couple of years to appeal to a wider audience. Although credit and bank cards remain the principal means of payment, at least three major new payment systems are also available: (1) prepaid vouchers or cards, which can be purchased offline with cash or other payment means; (2) online credits that can be purchased off-line or earned online, as well as purchased online; and (3) mobile phone payments.

For example, all of Microsoft's online paid services accept credit and bank cards. Its MSN Music service also accepts prepaid vouchers,⁹ and Xbox Live has a system of Microsoft Points that can be acquired both online and offline.¹⁰

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

Vigorous competition, consumer demand, local and global cost structures and other market forces determine the pricing of the content and services that Microsoft offers within the EU and worldwide. We believe this is the way pricing should be set by all companies in all sectors.

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?

⁸ See FDS International, Credit Card Survey for the Office of Fair Trading (2004), www.oft.gov.uk/NR/rdonlyres/33277732-EDE6-4DB3-849D-1A0C9032E132/0/oft709.pdf.

⁹ See <http://sib1.od2.com/common/Framework11.aspx?shid=0170002E>.

¹⁰ See <http://www.xbox.com/en-gb/live/xbox360/features/microsoftpoints.htm>.

In general terms, licensing should remain at the discretion of the content's rights owners. Software, publishing, phonogram and even film licensing in many cases can already be negotiated centrally for multiple territories.

Multi-territorial licensing should be encouraged as a matter of good business practice and convenience. Rights societies should have the ability to facilitate competitive multi-territorial licensing.

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?

With respect to the rights of music authors and composers, territory and membership limitations among (primarily Continental) European authors' rights societies as historically structured have made it difficult for internet-based music services to obtain pan-European rights clearances to date. Press reports indicate that the European Commission has challenged these limitations. Modernization of collecting societies' roles and responsibilities is critical to empowering rather than hindering licensing for online markets. Collecting societies should only be permitted to exercise rights that have been expressly granted by the particular rights owner whose work is at issue.

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.)?

Microsoft believes strongly that right holders must be appropriately compensated for use of their works, that consumers should be charged market-based prices that accurately reflect the specific use of a particular work, and that innovation in the digital-rights management (DRM) and DRM-enabled services sectors must be encouraged to implement a whole range of new, competing and market-based usage and compensation models.

Private copy and levies may have provided a form of unaccounted compensation for offline copying of unprotected formats, but are not needed where protection is readily available. With the availability of DRM, digital distribution enables creators to offer consumers a variety of product and service 'packages' that include a range of private copying permissions. For example, a song may be available for use on a limited number of devices on a rental basis for so long as a consumer pays a monthly fee. If consumers prefer to have permanent rights to use the content, they might purchase and download that song at a higher price. In either case, the consumer has elected to pay a particular price to purchase a specific amount of private copying. Secure digital distribution enables direct bargaining between copyright owners and consumers for private copying and the many other available usage options.

By implying greater 'rights' to copy than the consumer has actually bargained for, private-copy levy systems can undercut new market-based online bargains, rendering some business models impossible and others less viable and less attractive. This undermines the very usage and pricing flexibility that the digital revolution was meant to promote, and instead promotes a return to one-size-fits-all content offerings of the past. Non-market levy systems simply must be phased out.

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?

The principal legal and regulatory barriers that undermine the development of a healthy market in online content and services are as follows:

- i. Inadequate copyright rules.** These would include particularly:
 - **Overbroad private copy and levy regimes**, which at their worst might even attempt to treat widespread unauthorised downloads (or even uploads) from illegal sources as legitimate, and lull consumers into believing that they have paid for a 'right' to copy at non-market prices, which undermines legitimate sales.
 - **Non-compliant member state legislation**, which does not adequately implement the letter and spirit of the Community's directives in the copyright area. Spain still has not implemented the 2001 Copyright Directive, for example. Member states' implementing legislation should be carefully reviewed for compliance with this directive.
- ii. Inadequate protection for digital rights management (DRM) technology:**
 - **Failure to protect all forms of DRM technology effectively.** Some member states, for example, have failed to make it unlawful to traffic in technologies that enable hacking of 'access control' technologies, despite the Copyright Directive's requirement to do so.
 - **Unjustified interference with or expropriation of DRM technology.** The recent French copyright amendments hurt technology development and security, undermine market-based content distribution, and appear to violate EU and WTO rules.
- iii. Inadequate IP enforcement rules.** Specific improvements are needed in EU and national rules on intellectual property enforcement to help fight counterfeiting and piracy:
 - **Criminal-enforcement directive proposal.** With respect to copyright and trademark counterfeiting and piracy, the proposed Directive to strengthen the criminal law framework to combat intellectual property offences could be improved. For example, it could be amended to raise the minimum-maximum penalties, impose some statutory minimums, add aggravating circumstances, allow the destruction of the materials and implements principally used in the crimes, require the forfeiture of all proceeds of crime, define 'commercial scale' in a way that covers corporate end-user piracy, specify director liability, add workable presumptions of copyright ownership and validity, permit disclosure of evidence to rightholders, and specify the contact group or unit that will co-ordinate cross-border enforcement.
 - **Cumbersome or insufficiently deterrent civil-enforcement rules.** Several measures are needed to streamline civil copyright enforcement within the member states, including the availability of hearsay evidence to obtain civil search orders, presumptions that allow sampling to be used in proving the scale of infringement, a requirement to produce any claimed licence in order to rely on such licence as a defence, damages calculations that in fact serve as a deterrent (as required by the WTO TRIPs Agreement), and elimination of expensive procedures such as 'supervising solicitors' in the UK that serve as a barrier to enforcement.
- iv. Inadequate and overly expensive patent protection.** Many of the technologies required to develop and deliver online content are protected by patents. Improvements in the European patent protection system would help maintain European competitiveness and innovation in the face of global competition:

- **Unnecessary, expensive translation requirements.** The number of language translations (twenty and counting) required to secure patent protection throughout Europe needs to be reduced. The London Agreement, a protocol to the European Patent Convention (EPC) that would help in this regard, should be ratified by all member states. Translation costs have also been the major barrier to industry support for a Community Patent (which under its most recent terms would be two to three times more expensive than its Japanese and US counterparts).
- **Patent litigation cost and uncertainty.** The European Patent Litigation Agreement (EPLA), another proposed EPC protocol that would establish a unitary Europe-wide patent court and appeal system, would be a major improvement to reduce duplicative litigation and increase business certainty.
- **Threatened criminalisation of patent infringement.** While we generally would like to see improvements to the proposed EU criminal sanctions directive as described above, its proposal to criminalise patent infringements is not necessary and could have unintended consequences given the complexity of patents. Civil enforcement is an adequate route for patent-infringement litigation.
- **Uneven access for Small and Medium Enterprises (SMEs).** The cost of patent prosecution can fall more heavily on SMEs. Microsoft would support discussion of patent fee increases for bigger businesses to enable lower patent fees for SMEs, but we would also like to see government action in this area. One suggestion is to extend research and development tax credits to cover the legal fees incurred by SMEs when drafting and applying for a patent.

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

Microsoft operates in virtually every country in the world. The markets most conducive to the development of creative online content and services have an educated and innovative workforce, effective intellectual property protection and enforcement, a good telecommunications infrastructure, a taxation and fiscal system that encourages rather than penalises success, and a light regulatory regime.

Release windows

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

'Release windows'—which typically refers to the phased roll-out of a creative work in individual countries and across geographic regions—are a valid and necessary tool to address logistical barriers and licensing restrictions that may limit when and where a work can be released. Furthermore, they enable modification of works to address cultural sensitivities that apply in some regions but not others. International copyright and trade treaties give copyright owners the right to decide whether, when, where and how to release and distribute their products—an important right that should be maintained in the digital age.

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?

The term 'network neutrality' often means different things to different people. As the Commission has done in its review of the New Regulatory Framework (NRF), it is important to distinguish clearly between *basic connectivity* issues, on the one hand, and *service level* issues, on the other.¹¹

The four 'Net Freedoms' enunciated by US Federal Communications Commission and endorsed by the European Commission staff in the Framework Review address *basic connectivity* issues. These principles assure users the freedom to access and to distribute lawful content, to run non-harmful applications, and to connect devices of their choice to their broadband internet services. In Microsoft's view, the NRF should be modified slightly to make it clearer that these protections should be part and parcel of member-state implementations of the NRF. Respecting these principles law is one important step towards maintaining a suitably open environment for the continued creation and enjoyment of online content.

Differences among *transport service levels* also can affect the use of content, information society services and devices. Here, the more specific concern arises where a facilities-based network operator might choose to provide different quality of service to third parties on a discriminatory basis. As a general matter, network operators should be encouraged to create new service tiers and otherwise to invest in their networks in order to make more capabilities available to more and more customers. In return for these investments, the rules of the market would allow the network operator to seek higher prices from users of higher amounts of bandwidth and/or from users of other enhanced network capabilities. In the Network Framework Review the Commission has recognized the appropriate governing policy principle -- that similarly situated network users should be treated similarly. In this way, a network operator would be limited in its ability to degrade or otherwise interfere with the third-party offerings that make use of its network. Microsoft will elaborate further on how the Commission might clarify the reach of the NRF in its comments to the Network Framework Review.

Piracy and unauthorised uploading and downloading of copyright protected works

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

In the software sector, the industry estimates that 35% of business software in use worldwide (from offline and online sources) is infringing, at a value of approximately \$34.3 billion—\$11.8 billion in Western Europe alone.¹² The games-software sector estimates its worldwide losses from piracy at €2.5 billion, not including online piracy.¹³ The other content-specific sectors publish piracy statistics annually.

Unauthorised uploading and downloading are two sides of the same coin—an unauthorised (and hence infringing) distribution *and* reproduction of someone else's copyrighted content in the same transaction. Indeed, some peer-to-peer services make a downloader into an uploader the second he or she downloads a file. While

¹¹ Commission Staff Working Document, Communication from the Commission on the Review of the EU Regulatory Framework for electronic communications networks and services, COM(2006) 334 final (28 Jun. 2006), http://europa.eu.int/information_society/policy/ecomm/doc/info_centre/public_consult/review/staffworkingdocument_final.pdf.

¹² Third Annual BSA and IDC Global Software Piracy Study, May 2006, <http://www.bsa.org/globalstudy/upload/2005%20Piracy%20Study%20-%20Official%20Version.pdf>.

¹³ [http://www.isfe-eu.org/index.php?PHPSESSID=6bff74df1db25ec3483ca2dec919c228&template\[0\]=matrice.html&template\[1\]=rubrique.html&oidit=T001:a31bfad925b6f3ba0336731398e36fef](http://www.isfe-eu.org/index.php?PHPSESSID=6bff74df1db25ec3483ca2dec919c228&template[0]=matrice.html&template[1]=rubrique.html&oidit=T001:a31bfad925b6f3ba0336731398e36fef) .

we are pro-technology and embrace the promise of new technologies like peer-to-peer networking for legitimate purposes, these must be used responsibly and in compliance with copyright and other laws.

The essential question is not whether a pirate is 'small' or 'big', but whether the law has been broken and what the scale of the infringement has been. Given that there are nearly one billion internet users worldwide, and that perfect copies of works like software can be distributed online quickly and massively around the world, the level and damage of online infringement can be every bit as serious (truly on a 'commercial scale', regardless of motivation) as the worst physical piracy cases.

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?

Software and information-technology industry associations of which Microsoft is a member, as well as industry associations in every other content sector and some governments, conduct regular intellectual-property as well as anti-piracy awareness campaigns. We view these as vital for making the public aware of legitimate products and services, promoting respect for copyright, and deterring illegal use of copyright material.

The business software industry, for example, provides a *Cyberguide for Parents* and a *Guide to Software Management* for businesses.¹⁴ Microsoft itself provides on its website practical information for consumers about copyright, licensing and piracy, including information about *How to Tell* whether one is using licensed or illegal software products.¹⁵

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?

Peer-to-peer technology is a positive technological development that holds promise for solving a number of challenges posed by online distribution, ultimately reducing prices and increasing availability. Peer-to-peer technologies may solve many of today's online distribution challenges if combined with the effective use of DRM and other technologies that allow rights owners to communicate terms of use, to determine how their content is delivered, accessed and used, and to collect payment for such use

At the same time, however, peer-to-peer technologies must be used responsibly. Technology and distribution models will continue to change, but they are most likely to change in a positive manner if intellectual property rights are protected appropriately on the Internet and can continue to foster broad economic growth. Not just peer-to-peer file sharing, but a whole range of new business models has become possible online. Within the music world there is everything from downloading a song for a fixed price (MSN Music, iTunes, Rhapsody, Playlouder and HMV), to monthly subscription 'rental' of access to a song (Napster, Musicnet), to offers of both such options by some vendors (Napster, Rhapsody), to try-before-you-buy models (WeedShare, FileCash, PassAlong). New models and offerings are introduced regularly. No legitimate (i.e. licensed) business model should be given a regulatory preference or handicap over another. All should be left to compete in the marketplace for consumer acceptance.

¹⁴ <http://www.bsa.org/uk/antipiracy/index.cfm>.

¹⁵ <http://www.microsoft.com/piracy/default.mspx>.

The fact that the Internet makes it easier or more convenient to ignore IP rights should not change our steadfast commitment to protecting IP rights. Courts should have the authority to enjoin illegal uses of any technology that undermines the rights of copyright holders. If a distributor of a technology actively and intentionally encourages others to use it to infringe copyright, that distributor should be held liable.

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)?

Rating or classification of content is generally not a significant obstacle to growing the online content business in Europe. Ratings apply to entertainment software, music, and films in many countries. There are also labelling schemes – methods of attaching metadata or other descriptive identifiers to media content files – under consideration which will enable ratings information to be displayed and acted upon by users.

The main issue for the European online content market in this area is the uncertainty with respect to regulation of the online content market created by the proposed Audiovisual Media Services Directive, and in particular, the possibility that such would undermine existing self-regulatory ratings systems.

Self-regulatory and co-regulatory measures are both common and have proved to be effective in the European content sector. Self-regulation has resulted in rules that are specific and appropriate for each type of online service and that are supported by industry. This has fostered responsibility by all for content, and led to collective action, technology tools, consumer education, and support for law enforcement. Growing the online content industry in the EU would be best served by continued focus on these types of solutions for digital media and services. This experience should bolster the Commission to further encourage methods of self-regulation as the right tool for achieving policy goals in this area.¹⁶

With regard to common EU rating systems, ISFE (the entertainment software association in Europe of which Microsoft is a member) has developed the self-regulatory PEGI (Pan-European Game Information) programme, the first system of harmonised age ratings throughout Europe. PEGI provides independently checked, easy-to-read recommendations that allow parents and others to make informed buying decisions about interactive software. ISFE is now enhancing the PEGI-related information given to parents by developing a ratings system for online content, with the support of the European Commission's Safer Internet Programme. More details can be found at www.pegi.info.

As a general matter, developing common EU rating systems for each type of content would not be easy. Where it can be achieved it would be a helpful development for integrating the single market. In cases where it cannot, Microsoft and others are investing in both web filtering tools and metadata solutions to enable European consumers to manage content effectively.

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

¹⁶ For extensive research documenting the development of self-regulatory and co-regulatory solutions, see studies conducted by the Hans-Bredow Institute (<http://www.hans-bredow-institut.de/english/index.html>) and the Oxford Programme on Comparative Media Law and Policy (<http://pcmlp.socleg.ox.ac.uk>).

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?

Microsoft uses digital rights management technology in many of its products and services (for example, Microsoft Office Rights Management Service for document security, and Windows Media DRM in Windows Media Player and Microsoft TV). Microsoft is also one of the major providers of DRM technologies used by others. Microsoft licenses its Windows Media DRM widely to all kinds of content and service providers.

DRMs enable the management and security of a wide variety of new distribution models for online content. The online market can accommodate a variety of distribution models in order to address the competing needs of different content creators. Reliable and trustworthy DRM is an important option for the vast majority of content owners. Microsoft's views on the purpose, workings and policies necessary for the success of DRM-protected content are set forth in response to question 29 below.

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?

Microsoft and several other vendors offer robust DRM systems offering security levels and options for protection suitable for all kinds of online content and services. Any content or service provider can get access to and implement DRM systems that are adequate for their purposes.

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?

DRM systems are used in virtually every country by rights owners of business and entertainment software, music, films, text and other kinds of digital content. There is a wide variety of such systems available, each with its own set of features. They vary in the range of options they provide and the amount of configurability of the DRM. Windows DRM offers a broad range of features that can be configured according to the content or service provider's business model and the bargain struck between that provider and the consumer. Microsoft considers it to be of paramount importance for its DRM-enabled products to be transparent and user friendly. Microsoft understands that users need to know that a DRM-enabled product will perform in a consistent and expected manner.

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?

There is not a universally accepted definition of 'copy protection measures'. 'Rights management' or 'digital rights management' describes the universe of technologies that allow the rights owner or service provider to determine what usage options are available to the consumer. Copying is one of the content provider's rights that may be licensed or prohibited at the rights owner's discretion, and there are a range of DRM technologies that prohibit or deter unauthorised copying. Windows Media DRM, for example, allows rights owners to prohibit copying of a digitally transmitted work or to permit a particular number of copies or copying onto particular devices.

If by 'copy protection technology' the Commission is referring to the application of DRM technologies to traditional music CDs to try to make them unplayable and thus

uncopyable on personal computers, Microsoft does not offer those types of technologies.

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

Digital rights management is integral to the digital marketplace. DRM technology provides a flexible model that balances both the needs of music, film and other rights owners and of consumers.

Adequate legal protection and non-interference with technology are crucial. With such policies in place, the market can continue to develop and improve DRM to enable even more exciting and novel offerings. Without these, technology development, product security, and service offerings are undermined.

Regulation removes economic incentives to create and improve DRM, inhibiting the development of an efficient market that balances the needs of all stakeholders. Providers of DRM software include Thompson, Phillips, Sony, Apple, Microsoft and others. Microsoft alone has invested hundreds of millions of dollars in creating DRM. Allowing DRM makers the freedom to innovate ensures they will continue to meet the needs of both content owners and of consumers. Undue regulation of DRM software violates the rights of DRM creators under EU and international law.

Consumer choice and industry-led co-operation, rather than regulation, are the best options for promoting a rich digital marketplace that includes interoperability options. As described in response to question 3 above, consumers may decide that they prefer simple device-specific services or more elaborate solutions that work on multiple devices. So long as consumers are adequately informed of what they are buying, healthy competition should be encouraged between different innovative offerings that offer a variety of different features, compatibility, interoperability, and ease-of-use options, which succeed or fail based on consumer demand.

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 and archives will be increasingly important for the maintenance of, access to and spread of cultural content and knowledge world-wide. Microsoft is participating in pilot projects for digitising and providing online access to major libraries' collections. Much that is being digitised is a wealth of out-of-copyright material from previous centuries. With respect to more recent, copyrighted material, it is important that digital libraries and similar initiatives fully respect copyright and other rights of content owners, that they proceed only on the basis of consensual licences with the rights owners, and avoid infringements and other interference with the normal commercial exploitation of the copyright 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.)?

European equipment and software manufacturers already play a significant part in the global market for products, equipment, technologies and services related to online content. They participate in major consortia, standards bodies and design teams. They are as competitive as their counterparts in any other part of the world.

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.)?

As detailed elsewhere in this response, the primary role of governments should be to

- Provide effective copyright protection and enforcement regimes.
- Provide efficient, affordable and accessible patent systems.
- Protect digital rights management technology robustly.
- Eliminate the interference with new business models and technologies that private copy/levy regimes and DRM regulation cause.
- Leave the market free to compete and provide consumers with a rich variety of new means and options to enjoy content online.

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?

Legislation at the EU level is largely adequate to promote the development of online content services, as evidenced by the explosive growth in this area to date. Remaining regulatory and implementation barriers, including those that could be addressed at the EU level, are described in the response to question 17 above.

It may be helpful for the Commission to broker an 'Content Online' charter among content and service providers to promote the same principles put forward in the 'Film Online' charter.

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Microsoft would be pleased to provide any further information the Commission may request. For more information, please contact the following:

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