

Public Consultation on Content Online in the Single Market

This note sets out the general, preliminary comments of the Sports Rights Owners Coalition (SROC) on the Public Consultation.

Introduction to SROC

The Sports Rights Owners Coalition (“SROC”) is an informal group of representatives of international and national sports bodies with a particular focus on rights issues.

SROC operates as a forum through which sports bodies can share information and experiences. In particular, the purpose of SROC is to enable:

- discussion and sharing of best practice on key legal, political and regulatory issues;
- raising awareness of new developments and innovation in sports rights; and
- sports to take joint action to protect and promote their rights.

Sport is special. It has the power to bring together nations, religions, races, and people of all ages. Sport can make a real difference to peoples’ lives and delivers huge economic and social benefits at national and local level.

SROC members sell rights to create income that can be reinvested into their sport. Due to its immense popularity across the world, sport is attractive to pirates and commercial undertakings looking to sports content to create profit, without any re-investment in sport.

SROC seeks proper recognition of the value of sport from governments across the world, and effective protection for their rights under law.

SROC members are looking to national governments and international treaty organisations such as the European Union, WTO and WIPO to:

- Fully recognise, protect and promote the special nature of sport and sports rights;
- Provide comprehensive protection for sports rights, including their names, logos and marks;
- Prevent the theft of sports events broadcasts by pirates;
- Outlaw ambush marketing and ticket touting/scalping; and

- Create a regulatory regime for sports betting that allows sport to protect its integrity, and that establishes a fair return to sport for the use of their events and statistics by betting companies.

We would ask the Consultation to support us, and to recommend the necessary action to achieve these goals.

General Comments on the Consultation

The SROC, and sports organisations generally, consider content creation, production and distribution to be at the heart of its operations. As such, SROC and its member bodies have a significant interest in the Content Online Consultation process (“the Consultation”). We welcome the opportunity to comment as part of the Consultation and look forward to contributing to the process going forward, including meeting the Consultation team to work through the detail of the great many issues that are being considered.

This consultation is of course just one of a significant number of on-going consultations and reviews of issues relating to broadcasting, through traditional and emerging services, at national and EU level. These consultations overlap to a considerable degree, and can create a difficult, and at times confused and contradictory environment for industry operators. DG Information Society (“DG INFSO”) and Media will be well aware of the current revision of the TV Without Frontiers Directive or Audio Visual Media Services (AMS) Directive. A number of SROC members have contributed extensively to that process, and we would repeat our views made throughout that process.

We would also refer specifically to the Independent European Sport Review (“IESR”) report of Jose Luis Arnaut to the EU Sports Ministers commissioned during the UK Presidency. The IESR makes important recommendations for action at EU and Member State level for the promotion and protection of the commercial rights of sports organisations. SROC supports these particular conclusions of Mr Arnaut and looks forward to the further consideration and consultation on them.

Finally, we would refer to the possible White Paper on Sport to be produced by the European Commission. Most important is the initially stated intention of addressing issues relating to the economic significance of sport.

It is of considerable importance that these reviews and consultations are joined up.

The Fundamental Importance of the Rights Framework

However, of all the current reviews, the most important in the context of the issues in the Consultation is the review of copyright being carried out by DG Internal Market and related reviews across the European Institutions and Member States on intellectual property rights.

SROC and other submissions on the TVWF/AMS review have stressed that the single most important issue is a comprehensive regime to protect intellectual

property rights. This is of fundamental importance to content creators and producers such as sports bodies, and applies to all means of distribution. In a very fast developing, globalised technological and market environment such as applies to online content, the existence of a clear rights regime to protect and promote intellectual property is even more important. Investment in sport at every level – investing in people and facilities at the grassroots and in talent development as well as at the elite levels – is dependent on achieving the proper returns due to the creators of sporting content. Not only is this important to the sports themselves, but also to the wider economy, with sport making an increasing contribution to European GDP.

SROC would therefore urge DG INFSO review this area with the aim of reconfirming the fundamental and paramount importance of intellectual property rights, particularly copyright. All content production and exploitation relies on an effective intellectual property regime – in terms of rights protection and enforcement - at national, EU and worldwide levels.

The intellectual property regime does not “hamper” the development of online content and services. It is our view that the contrary applies. For example, European football and other major rights owners have extended and developed their rights arrangements to provide wide online distribution.

We would therefore urge that the Consultation places at its core the rights regime that is itself the subject of general review by DG Internal Market, and the subject of a study by Professor Hugenholtz. In addition the UK Government will shortly publish the report by Mr Andrew Gowers following his review of the intellectual property regime in the context of the digital age.

The discussion in relation to the proposed AMS Directive has demonstrated a real lack of understanding of intellectual property issues, particularly copyright, in the context of the new digital economy.

The Directive has been subject to widespread review in recent years, and the European Commission proposals to amend it in the context of structural and technological developments in the broadcasting business are currently being considered by the European Parliament and Council of Ministers.

Article 3(b) is intended to ensure the open availability on a trans-frontier basis to “traditional” broadcasters of short extracts of footage in events of public interest in that country for the purposes of general news programmes. However, the proposed text goes about this in a way that ignores and/or confuses the long established fair dealing principles contained in the EC copyright regime and many national systems, and shows a disturbing lack of understanding of the realities of audio visual rights in the digital economy.

Any problems that there are in the access of a news broadcaster to footage for genuine news purposes (and no evidence has ever been shown that there are any) should be addressed through harmonisation across the EU in relation to fair use and fair dealing. The Commission has failed to provide evidence that the existing

copyright regime and its longstanding provisions to protect news access are not working.

A Global market - Need for a Global Response

Technology is challenging existing markets, and creating new markets. This leads to a very fast developing market, with a globalised outlook. This is the landscape within which sports organisations are operating.

We would stress the overwhelming need for the Consultation to address the fact that sports bodies are often international in outlook, with a significant licensing business in territories outside the EU. And with this popularity on a global scale comes the ever-increasing threat of digital piracy.

The outcome of any review of Content Online must recognise and promote the need for treaty obligations to achieve clear legal and regulatory conditions for a global economy. And this means globally recognised and enforced regimes for the protection of intellectual property rights.

Other Rights - Sports Betting

For the Consultation to be credible in the new market environment, it needs to review the totality of online content on which businesses are trading.

A substantial proportion of betting in Europe takes place on sports (see Study of Gambling Services in the Internal Market of the EU, ISDC/EC, 24 April 2006). A substantial amount of betting worldwide takes place on European sports.

However, as the IESR recommendations note, there is no (or at least inadequate) recognition at EU level of this very significant, increasingly online activity using sports content.

We see the relationship between sports rights owners and betting businesses as an important test case of the traditional rights approach in the new economy. Digital technology has created a new economic environment, where the immediate, spontaneous and uncertain has become the content of real value for a wide range of businesses – particularly online sports betting businesses. We would urge the Consultation to now analyse specifically the rights regime.

This issue needs to be addressed regardless of other issues relating to Member State and other government policy on sports betting. For instance, in states where a private sports betting is legitimate under national law, bets may be offered on sports in another nations without any return to that sport, or any compulsion to seek permission to offer the bet. This can be addressed and enforced on a global basis only through the creation of a clear rights regime.

This can be done through clarification of existing legislation at worldwide, EU and/or national level, or through a new approach such as the adoption of a sports specific-betting rights regime.

Internet/P2P Piracy

Major sports events and competitions are very attractive, and in great demand, making them particularly vulnerable to attack from pirates, counterfeiters and ambush marketeers.

Existing copyright and related rights regimes are useful in combating more traditional forms of piracy. However, they do not necessarily go far enough in dealing with the newer forms of piracy that sports bodies are encountering in the new digital economy. A particular problem has been the growing phenomenon of internet streaming of live sporting events. Peer to peer, or P2P, piracy is a very real example of the need for a coordinated global response to digital piracy. It also presents unique challenges due to the nature of the “live” event broadcast as opposed to music or film piracy. Live broadcast is the key content of sports businesses and we would urge the Review to address this in its recommendations.

This streaming works by an individual setting up a website through which he supplies streamed footage. Often that individual will put a false name and address on the domain register. The original broadcast of the signal of the footage is received into standard receiving equipment, such as through a satellite receiver, cable set-top box or a tuner built into a standard video recorder. The signal is captured by some form of video device along with supporting driver software. Limited copying within the terms of general copyright regimes takes place at this stage: a single copy is made on the computer which is used to capture the signal, amounting to infringement of copyright in the footage. However, in order to stream the signal, it is necessary to use a certain bandwidth for transmission. A domestic computer is unlikely to have sufficient bandwidth to enable transmission, and so the infringer will generally convert the captured signal, in real time, into a suitable format to transmit to the server of an internet service provider (“ISP”). In our experience, the server is often located in a territory - such as Russia or China - where the local law does not offer the same level of protection as in EU Member States, and where there is little or no duty on the foreign ISP to co-operate with rights holders in identifying the infringer.

The other possibility is that the infringer will transmit the signal to an end user's computer, and the end users will stream the signal via a peer to peer/P2P network, in respect of which the infringer claims no involvement.

There are a number of ways in which existing legislation could go further in assisting sports bodies in the prevention of this unlawful activity. Two ways are particularly relevant:

(a) The use of the internet by pirates raises the issue of the international protection of rights. It is our view that there should be adequate reciprocal arrangements in place between jurisdictions whereby ISPs in foreign territories are obliged to assist rights holders in identifying infringers and to take action against those infringers.

(b) Some thought should be given to reversing the burden of proof in a copyright infringement action against an internet pirate. If a potential claimant can satisfy a certain threshold by showing that an individual is connected with the operation of the site (for example, if they receive payment for the internet streaming, or if they have been in communication with the ISP involved in the streaming), there should be a presumption of copyright infringement, unless the defendant is able to prove that he was not the person responsible for the streaming. This would prevent a defendant from simply taking no part in a copyright infringement action, leaving it to the claimant to try to establish its case on the basis of very little evidence due to the fraudulent concealment of evidence.

Conclusion

A comprehensive regime to protect intellectual property rights is of fundamental importance to content creators and producers such as sports bodies, and applies to all means of distribution. In a very fast developing, globalised technological and market environment such as applies to content online, the existence of a clear rights regime to protect and promote intellectual property is even more important. SROC would therefore urge DG INFSO review, with the aim of reconfirming, the fundamental and paramount importance of intellectual property rights, particularly copyright. All content production and exploitation relies on an effective intellectual property regime – in terms of rights protection and enforcement - at national, EU and worldwide levels.

SROC welcomes the opportunity to contribute to the Content Online Consultation. We would be happy to discuss the issues raised by our submission with officials and to answer any questions that they may have. Our membership covers a wide range of sports from across (and beyond) the EU and we are therefore in a position to offer examples of the problems faced by sport, of current practice, and of the way different sports are addressing those challenges.