PUBLIC CONSULTATION ON CONTENT ONLINE IN THE SINGLE MARKET

UK Film Council Response

October 2006

Executive Summary

1. The UK Film Council sees the European Commission's Content Online initiative as building on its predecessor initiative Film Online. It is an opportunity to fill in the many gaps left following the Film Online dialogue: Film Online highlighted that the content sector and the telecommunications sectors were unused to talking with one another. Most of the work of Film Online was to establish a framework within which the dialogue between the two sectors could take place.

2. In an online world, the UK Film Council believes that public interventions will still be necessary to achieve both its own public policy objectives and those of the Commission.

3. The UK Film Council is optimistic that the market will provide an array of new services that will provide different forms of content to different audiences, enhancing both choice and access. But public interventions may also be required as a way of improving access to and building the widest audience for the fullest range of films, and thereby advancing cultural diversity. Non-commercial services like the Creative Archive and the BFI's Screenonline are vital for setting a benchmark in terms of quality and diversity of content as well as ease of access.

4. The development of critical, creative and cultural skills, which is an intrinsic part of media literacy, is central to realising the full benefits of content in an online world. Media literacy therefore needs to be a cross-cutting theme within the proposed Communication.

5. Copyright theft and online infringement is a major issue for UK film, and will remain so as the take-up of online services accelerates.

6. The UK Film Council welcomes the constructive discussions with the European Commission to develop an action line within the MEDIA Programme to assist the establishment of online on-demand services devoted to European film.

Introduction

The UK Film Council is the Government-backed strategic agency for film in the UK. It aims to stimulate a successful, vibrant film industry and to promote the widest possible enjoyment and understanding of cinema throughout the UK.

With France's Centre National de la Cinématographie, the UK Film Council represented Europe's national film agencies at the Leadership Summit on Film Online convened by Commissioner Reding in 2005, and participated in the drafting of the Film Online Charter published in May 2006.

The Film Online initiative helped identify the elements that still need to be put in place before the market for on-line content can fully develop. These elements include solutions to the problem of giving consumers what they increasingly appear to want (any content, any time, any place and any way they wanted it) without unduly compromising the interests of rightholders.

One key element to this is of the development of effective Digital Rights Management systems (DRMs). But, significantly, in drawing up examples of "commendable practice", the group preparing the Film Online Charter was unable to cite any example of a "commendable practice" in this sphere.

Another element has to do with the financing of content. The emergent business model for film online is one in which revenues from online exploitation are split between online platforms, service providers, rightholders and content producers.[1] But content producers, and licensees of rights, unless they have very deep pockets, cannot finance the content on the basis of the unknown returns they will get from online distribution, especially when they anticipate online distribution eroding their established revenue streams.

A third element – one which was passed over almost in silence – was the opportunity to use online and on-demand technologies to unlock access to the treasures of the audiovisual heritage of Europe (and beyond). The obstacles to achieving this aim, not least the cost of digitising and encoding the films, the resolution of rights issues, and the challenges of marketing and delivery, are daunting.

A fourth element was how to empower citizens by giving them the skills and knowledge required to find their way through the immense offer of content and services, to be able to make informed choices, and to avoid content which they consider might cause them or their families harm. This element is associated with the achievement of high standards of media literacy.

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[1] The latter may not always control the rights to exploitation, hence the distinction as between them and rightsholders.

The Content Online initiative is an opportunity to help put in place the missing elements. It provides the basis on which the member states, the Commission, industry and representatives of citizens and consumers can work together to ensure that the requisite policies are in place, in terms both of regulation and support. It also offers two further opportunities.

The first is to redress the policy balance which, as Commissioner Reding pointed out when she assumed responsibilities for Information Society, has been far more on promoting the roll-out and take-up of broadband networks than it has on the content and services to be carried on those networks. The second is to put as much emphasis on meeting the collective needs and expectations of citizens as on the needs of consumers and industry.

In preparing its own submission, the UK Film Council has had the opportunity to review two submissions; those of the British Film Institute (BFI), which is currently provided with funding of approximately £16m p.a. by the UK Film Council to help deliver the latter's cultural and educational strategy, and Scottish Screen, another of the UK Film Council's strategic partners.

We endorse those submissions. In particular, we would like to echo the BFI's twin propositions of the need for policies towards content online to give special prominence to the requirement to ensure the public's access to the audiovisual heritage, and for these policies to be accompanied by initiatives to foster the widest media literacy. We would strongly endorse the description by Scottish Screen of the role and responsibilities of public bodies charged with promoting audiovisual culture and industry.

In responding to the questions posed by the Commission in this consultation, we only cite those questions which have relevance to the UK Film Council's remit and/or those upon which we feel it is appropriate for us to offer a view.

<u>ANSWERS TO SPECIFIC QUESTIONS</u>

Consumption, creation and diversity of online content

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 UK Film Council does not believe that cultural diversity is self-sustaining in any context, least of all on-line. This is why, for example, cultural diversity is granted special treatment in the European Treaty, in actions and policies pursued by the European Commission (not least in actively supporting the UNESCO

Convention of Cultural Diversity, the MEDIA Programme and the Audiovisual Media Services Directive), and is at the heart of many initiatives undertaken by member states of which the UK Film Council represents but one. Therefore cultural diversity should be specifically fostered online.

The keys to people being enabled to share and circulate their own creative works are: access to networks, to the skills and knowledge to create and enjoy content, and access to the content itself. Policies at both the European and the national level need to ensure that these pre-conditions are achieved. Likewise, to respect and enhance linguistic diversity, policies need actively to advance the creation, access and exchange of a wide variety of content.

Any meaningful policy that seeks to embrace cultural diversity, must recognise not only linguistic diversity but also ethnic, sexual and religious diversity as well as other forms of difference. Such forms of identity often cut across linguistic lines and, conversely, those who share the same linguistic identity may not prioritise language as the principle means by which they define their identity.

A recognition of this enhanced notion of cultural diversity is crucial in an online environment because, increasingly, online communities are being formed by those who define their identities and interests in ways that do not correspond either to linguistic groupings nor by reference to the values of an individual nation state. The creation of such communities is encouraged by online services precisely because so many of those services operate without regard to the boundaries of language or such nation states.

The development of critical and creative skills, which are core to the development of Media Literacy, is essential in ensuring that all citizens are able to exercise their fundamental human rights in an online environment. The advancement of media literacy will also help to ensure that the full potential of these technologies to enrich the personal and professional lives of all the people of the European Union is realised. Media literacy should therefore be a cross-cutting theme of the Communication.

New business models and transition of digital 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?**

The UK Film Council has no plans to offer new services itself. We are optimistic that the market will provide an array of new services that will provide different forms of content to different audiences, enhancing both choice and access.

But the UK Film Council believes that public interventions may be necessary in relation to the development of on-demand (VOD) services as a way of improving access to and building the widest audience for the widest range of films.

This applies both to films available to the British public and UK films available to audiences throughout Europe and the world. These services need to run the gamut from commercial services to public initiatives such as the Creative Archive.[2]

We believe that public support is essential to assist rightholders of European films in delivering content to the market quickly, that is to say, before the market has matured and while the risks and unknowns are such that the commercial opportunities are limited. This is particularly true of many European works for which we still need to build awareness and audiences. We also envisage that public interventions may be required to assist the development of new models for licensing and exploiting works. We have in mind the "long tail" theory that we see as underpinning an approach that makes it feasible to offer the widest range of films, unconstrained by the limitations of shelf space that prevail in the analogue world (e.g. in a bricks and mortar DVD store).

11. What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of different players to secure a sustainable revenue chain for creation and distribution online?

One of the most significant challenges for the European film industry in an online environment is to adapt to a radical transformation in the way film revenues are generated and distributed.

European film - indeed, all film apart from that which belongs to the Hollywood majors - has tended to rely on the ability of the distributors, notably pay and free-to-air broadcasters as well as theatrical and DVD/video distributors - to advance or at least guarantee money to independent producers in order that they be able to make the films.

As the Film Online initiative illustrated, the film value chain may not automatically be transposed into the on-line environment. Many of the key players in on-line world – the telecommunications operators, internet service providers and the content aggregators – are likely to engage with the value chain for European film only on the basis of revenue sharing linked to compulsory licensing, an approach which is irreconcilable with the way the market for feature film currently operates.

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[2] See *bfi* submission for more details on the Creative Archive.

We are confident that, in time, that the reconciliation will take place but we fear that, in the short to medium term, European rightholders will find themselves at a severe disadvantage to the Hollywood majors who, by generally owning all rights to their content in all territories and all windows as well as having the ability to finance their content without resorting to pre-sales, are much better placed to adapt to the on-line environment.

It may be necessary to provide new forms of public support to address this imbalance.

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?

In an ideal world, creative businesses would benefit from Europe-wide or multi-territory licensing and clearance: as noted in our answer to Question 11, the Hollywood studios have the great advantage of being able to operate on a multi-territory basis. The corollary is that European creative businesses suffer from being unable to operate on such a basis, relying instead on local distributors and licensees. But if they could exploit rights in multiple territories - which means being able to promote and market on a multi-territory basis - they would. This means having the scale and scope to take risks.

The appropriate way of dealing with this in relation to new works is through contractual arrangements determined by market participants: if online offers the possibility of effective multi-territory distribution, creative businesses will retain control of these rights or license them to firms capable of exploiting them on a multi-territory basis rather than (as present) having to license them territory by territory.

For older works, the cost of clearing and assembling rights may be prohibitive. Rightholders may also not have the right incentives to make their library content available for fear that this would cannibalise both their existing revenue streams and the market potential of their new works.

15. Are there any problems concerning licensing and / or effective rights clearance in the sector and in the country or countries that you operate in? How could these problems be solved?

To address the problems of effective rights clearance, there needs to be better information about who holds what rights and what those rights are worth, along with simple ways of obtaining licenses. In some cases, the necessary rights for film have either never been cleared (a broadcaster may have cleared, for example, music rights, for only one or two transmissions) or are held –by platforms (e.g. broadcasters) who do not intend to use the rights themselves and are not minded to license the rights to others.

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 UK Film Council believes that an effective intellectual property (IP) regime in the digital age should essentially be founded upon an appropriate balance between the need to incentivise creation and innovation on the one hand, and the need to maximize the social, cultural and economic benefits of such creativity and innovation on the other.

The economic gains which accrue from the exploitation of IP are crucial to the development of the UK's film sector and its creative industries more generally, most especially to SMEs. But these economic gains should not be made at the expense of restricting the ability to legitimately enhance access to creative material which is made possible by digital technology.

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

In the UK the development of creative online content services has been dominated by the BBC and is an increasingly important area for public support; the UK Film Council has funded digital shorts for distribution on-line and has supported the experimental on-line release of one feature film (*Body Song*).

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 are an essential characteristic of the established business model for film. In the UK, release windows are governed by contract. Governance by contract appears to have served the industry well. We think that

in an online environment market participants should continue to determine what windows should exist, as they deem appropriate, and according to contract.

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?**

Copyright theft and online infringement is a major issue for UK film. Indeed it was characterised in a UK Film Council report, *Film Theft in the UK, published in October 2004* as "the biggest threat facing our industry." This is only in part a function of the revenues lost as a consequence of theft and infringement. It is also a function of the damage it does to the whole value chain, undermining the viability of cinemas, DVD outlets and pay-television.

Consequently, the UK film industry, with the active involvement of the UK Film Council, is very involved in three areas: enforcement of copyright, the development and deployment of technical solutions to make copyright theft and infringement more difficult and - very importantly - the education of the public, industry professionals, public officials and policy-makers about the importance of, and the rationale for, the laws governing intellectual property.

The distinction between unauthorised uploading and downloading is spurious: there would not be one without the other. A distinction between "big" and "small" pirates is really a distinction between people (and organisations) that make money out of piracy and people who save money by paying less for content. The former are the main target for enforcement; the latter are the main target for education.

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?**

Education and awareness-raising, as noted immediately above, are crucial. We believe that much more needs to be done especially with young people. This was a major thrust of the Film Online Charter. We would like to see education about copyright and its importance to the creative process given more prominence within the formal education system and industry training programmes.

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)?

Yes, rating and classification is an issue for the UK film sector.

Practices concerning classification have to be national in order to reflect the very different cultural perspectives and traditions which prevail in different parts of Europe. For example, a scene which is considered suitable for children to watch in one country may be considered unsuitable in another. We do not consider that these different practices cause significantly inhibit the free movement of creative services.

Classification in the UK is carried out by The British Board of Film Classification (BBFC), an independent, non-governmental body, which has classified cinema films since it was set up in 1912, and videos/DVDs since the passing of the Video Recordings Act in 1984. Statutory powers on films at the cinema remain with local councils, which may overrule any of the Board's decisions. The Board is a statutory designated authority for video/DVD.

Companies that submit films for classification pay charges for this service and this provides the BBFC with its funding.

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?

Non-commercial services like the Creative Archive and the BFI's Screenonline are vital for setting a benchmark in terms of quality and diversity of content as well as ease of access. In addition, such services often are based on content for which the public has already paid. In principle, in an online environment, rightholders could be compensated for any loss via the on-line equivalent of the public lending right system which applies to loans made by UK public libraries; as the BFI has described in its submission.

We would anticipate, as happens with public service television already, that commercial operators will identify business opportunities on the basis of

identifying new markets which the non-commercial services have seeded. Therefore the non-commercial and commercial offers are highly complementary,

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.)?

National and regional bodies (as well as local ones), in the UK and throughout Europe, have a highly significant role to play in creating an environment which is favourable to the emergence of new business models. They can do this by encouraging innovation, facilitating access and promoting the benefits of online services. The creation of specific new business models is best left to the market.

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?

The UK Film Council, along with Europe's other national film agencies, is involved in very constructive discussions with the European Commission to develop an action line within the MEDIA Programme to assist the establishment of online on-demand services devoted to European film.

The role of the MEDIA Programme in promoting understanding about how to implement such services may be as important as the funding it provides. We also think that other EU programmes, notably the Competitiveness and Innovation Programme, should contribute in a major way to assisting such initiatives.