

Executive Summary

- **About Disney** - Since its founding in 1923, The Walt Disney Company has remained faithful in its commitment to producing unparalleled entertainment experiences based on its rich legacy of quality creative content and exceptional storytelling. Today, Disney is divided into four major business segments: Studio Entertainment, Parks and Resorts, Consumer Products, and Media Networks. The Walt Disney Company in Europe is a multi-million Euro enterprise with more than 5500 employees in 23 countries. Euro Disney Associés S.C.A which owns and operates Disneyland Resort Paris employs an additional 12,200 people from all over Europe.
- **Disney and Content Online** - One of the three main growth strategies we have embraced is the use of new technologies to reach consumers through a diversity of platforms and places. Disney content is offered to consumers throughout Europe in digital cinemas, in pay and free tv, as video and DVD, scheduled and on demand, mobile and fixed. Disney was one of the first companies to test offering television content for mobile devices and recently experimented with offering access to such content in an advertising supported model via the Internet. We currently have deals relating to different platforms like broadband or mobile and to different types of content across the EU, including, but not only, movies delivered via Video on Demand, games, cartoons or Channel offerings in various forms and shapes with such operators as France Télécom, TF1, Hansenet/Alice, Telekom Austria or Orange.
- **Consumer Choice For Legal Access To Content is Key to Content Online:** From our substantial experience in this rapidly changing market, the key to widespread digital distribution of compelling content is consumer acceptance for both new services and the digital content offered by those services. Interactive online games, ringtones or feature films: whatever the content, we want our customers to have the freedom to choose, or not to choose (preferably, to choose, of course) to access our content legally within a steadily increasing menu of other content offerings, across different types of content and across ever more different types of delivery systems. First and foremost this requires successful cooperation between businesses and experimentation with different models to better understand consumer desires in legally accessing content. Today, there are two obstacles in this respect: infrastructure gatekeepers and a lack of constructive, effective and cooperative efforts to promote legal access to commercial content over those infrastructures, including through cooperative efforts to address competing unlawful access to unauthorized versions of that same content by individual subscribers over those same infrastructures.
- **Infrastructure gatekeepers** can interfere severely with consumer choice. Market share for essential electronic communications infrastructure, like broadband or satellite television, is heavily concentrated in Europe, mainly for historical reasons. Triple Play and other bundling of essential consumer services like telephony can translate into one player per market being the gateway to the large majority of potential consumers. Both the electronic communications framework and general competition law should ensure that content providers are not

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foreclosed from accessing the market, in particular by vertically integrated infrastructure gatekeepers.

- **Facilitating intermediary cooperation to increase consumer choice for legal online content** is an idea most prominently suggested by Commissioner Reding in her speech in Cannes 2005. The Walt Disney Company has followed this model with a number of business partners. Unfortunately, some of our discussion partners in the EU have indicated concern with certain impediments to cooperation. We offer the two main arguments which we have heard over the last 12 months for the Commission's consideration on how to facilitate intermediary cooperation, possibly through legislative clarification.
 - Some have suggested that the graduated approach suggested in the Cannes 2005 speech may involve privacy complications. While we believe that these concerns do not and should not rise to the level of substantive legal impediments to cooperation in this area, our experience suggests that this is an area where, at a minimum, clarification by the Commission would be productive. Furthermore, this raises the more general question of how to enable intermediaries to effectively address abuses on their networks while working cooperatively to ensure the ability of victims of online misbehaviour to proportionately and efficiently defend their interests, both through civil and criminal means. According to our business partners, their interpretation of the law in some countries seems to make the Internet exclusive territory for prosecutors, - it allows, we are told, the criminal enforcement against individuals while severely limiting the realistic possibility for civil action. This perceived result appears unfortunate; in fact, less heavy-handed civil enforcement may be a preferable means of addressing many network abuses, without prejudice to criminal sanctions in appropriate cases. Should different national implementations of European laws cause such difficulties, legislative clarification may be helpful both to assist consistent cross-border redress and to make cooperation as suggested by the Commissioner more efficiently possible in more countries and thus enhance the functioning of the Internal Market.
 - There is concern that promoting legal access to content while undertaking meaningful efforts to limit unlawful access to the same content could result in competitive disadvantages. "Rogue" operators not interested in developing the market place for legal content could seek to use illegal behaviour on their networks as a lure for new subscribers. Concern over such competitive disadvantages – in reality the unilateral disarming in a market where unfettered and unremunerated access to infringing content serves as a real draw among many subscribers – results in a situation where many are afraid to take the corrective first step. Many legitimate operators would prefer a sectoral solution, we are told, for all operators in a market to jointly agree on taking pro-active steps against piracy so that none would suffer from competitive disadvantages. This is an area in which the Commission would seem ideally placed to act in order to ensure a level playing field.

QUESTIONNAIRE

TYPES OF CREATIVE CONTENT AND SERVICES ONLINE

For the preparation of this consultation, the Commission has identified the following types of creative content and services:

- **Audiovisual media online**
- film, television programmes, documentaries, news and blogs/vlogs, videocasts, series online, sports online, etc.;
- Music online (music downloads, ring tones, video clips etc.);
- Radio online (for instance podcasting, radio programmes, news, sport, etc.);
- **Games online** (such as Massively Multi-player Online Role Playing Games);
- **Online publishing** ('printed' material/books/newspapers online, etc.);
- **Educational content**;
- **Other creative online services** (cultural information, etc.).

QUESTIONS

Types of creative content and services online

1. Do you offer creative content or services also online? If so, what kind of content or services? Are these content and services substantially different from creative content and services you offer offline (length, format, etc.)?

Disney offers almost all of the types of content listed. Some are different depending on whether offered online – different media (mobile, for example) enable a different consumer experience and Disney's efforts go towards media tailored content – very largely a matter of experimentation in the emerging market place.

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.

No view

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.

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Speed of networks can still be a problem for customers accustomed to the television or video experience. The biggest obstacle remain difficulties with intermediary cooperation to increase consumer choice for legal online content in an environment that provides effective deterrents for unlawful access to and redistribution of the very same content.

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?

User rights, as data subjects, businesses, citizens and consumers, are as important online as they are offline. Enforceability of legally recognised rights across media is essential, as mentioned in the executive summary. A consistent approach must be taken that ensures both the public's concern for their privacy interests and their interest in a secure framework for distribution of compelling licensed content that promotes trust and accountability in the online experience. A system that fosters lawlessness and mistrust in the integrity of the network and the content it offers is not a system that is protective of the public interest. In terms of consumer acceptance, there is a different layer: consumer convenience. This is largely what makes a legal offering attractive and key to consumer satisfaction. Different content online business models are currently being put forward almost daily and this freedom to test legal models (legal under data protection, consumer protection or intellectual property laws) is paramount to the development of the market.

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?

Disney is committed to responding to consumers' preferences for how and where they access our content. Our content is available across a wide array of devices and through a number of distribution channels. We are committed to continuing to expand the opportunities for consumers to enjoy our content and are consistently engaged in exploring new ways to do so that offer consumers a compelling experience. Digital Rights Management in particular allows for product and service diversification which leads to wider customer choice and return on investment. The key components of interoperability regarding content online, convenience and security, will help the market to expand and, there is no demonstrated need to intervene. Any regulatory or legislative action would chill innovation.

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?

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No single person will ever be able to read, listen to or watch all the content that a single Internet access provides today – in any language of the world. Nor will any content provider be able to find a potentially wider public than the world – in any language.

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.

Disney has found that Europe's content industry, focused on providing the best viewer, listener and reader experience it can, benefits from its wide cultural roots, a deep talent pool and willingness to seek an audience beyond its borders, all of which will serve the industry well as content online opens new ways to serve an even wider public which will choose what it likes from a wide offering, including from the traditional, inevitably more finite, physical delivery.

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?

Disney operates across all of the EU and in all of the categories listed. We intend to offer legal access to our content to all European consumers with delivery platforms across Europe that guarantee a satisfactory consumer experience. At the moment, the most constant picture in the market is the emergence of new models, be they subscription, pay per title or advertising based. The same is true for delivery platforms of which broadband, mobile or P2P technology are just a few of many. In our view, the customer will decide which ways to legally access content are most convenient – offline, online or regarding the type of consumption.

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

Hopefully continued growth and ever greater choice for legal access to online content for customers across Europe.

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.

Bandwidth will always be an issue and faster and higher quality distribution will always add to customer convenience. Given the business models for distribution are still in full flux, the technical requirements are, too. There are some constants, including content protection across any

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distribution chain, where technologies are available with numerous companies competing to find the most flexible approach to accommodate the changing business models.

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 single most important element here is for the Commission to facilitate intermediary cooperation to increase consumer choice for legal online content in an environment that provides effective deterrents for unlawful access to and redistribution of the very same content. The burst of in particular new audiovisual services we are currently experiencing will at best be short-lived unless the Commission takes this unique opportunity of market convergence to facilitate such cooperation in a way that involves all players in the value chain in an efficient and expeditious manner.

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?

No view

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

The price is set by the market. Given the massive ongoing experimentation with new business models, higher efficiency and economies of scale will be natural strategies allowing content companies and platforms to adapt prices to demand. The one factor that could significantly undercut the free market is illegal access to content. Since price competition with “free” is inefficient for an economic operator (even though he may embrace the challenge), investment will necessarily shift away from high quality content. On the other hand, the growth of legal access to content will increase investment in this area, which in turn will affect employment and tax revenues.

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?

For Disney, as both a licensee and a licensor, clearing rights is part of doing business – as for any company active in the content business. As a licensor, Disney is often able to offer multi-territory licenses to its licensees. As a commercial operator, Disney has an obvious interest in bringing transaction costs down and multiterritory deals can offer that. It is, however, our experience, that the market is not necessarily interested in such deals. Our practical experience is

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that, while companies may in the past have demanded broad brush solutions for “pan-European” licenses, some of the very same companies, for example in the mobile sector, can act in an entirely different manner commercially. Sometimes, their individual divisions will require different content solutions dependent on national or regional customer interests. Fortunately there is increasing content expertise also on the side of new media players which will assist in even more efficient rights clearance across the EU.

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?

See 14

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.)?

Remuneration of rightholders will depend on individual contractual arrangements. With respect to remuneration for private copying, Article 5.2 b), 5.5 of the Copyright Directive have set out sensible guidelines which are worth pursuing once there is more experience with national implementations of this Directive, given the last of these only happened this year.

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?

Facilitating intermediary cooperation to increase consumer choice for legal online content will be key, notably through forwarding of notices to customers whose subscriptions are being used to break the law, including the possible suspension or termination of subscriptions used for repeat offences. As indicated above, apparent uncertainty on the part of some intermediaries regarding the appropriate construction of applicable privacy laws, as well as perceived “competitive disadvantages” stemming from a lack of a sectoral solution to address network abuses by intermediary subscribers, appears to be posing an impediment to cooperation in this space that could otherwise greatly improve the online experience and the viability of legal online content offerings.

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

Several countries have asked different stakeholders to come together for discussion to facilitate intermediary cooperation to increase consumer choice for legal access to online content. This is an area where a pan-European solution will help the development of a pan-European market.

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, for almost all countries of the EU, a matter of contractual arrangement between parties and subject to market conditions. This allows for flexibility to increase consumer convenience wherever possible. The online environment is part of the general environment for content distribution and Disney aims to offer consumers to legally access its content in as many economically sensible ways as possible.

Networks

20. The Internet is currently based on the principle of "network neutrality", with all data moving around the system treated equally. One of the ideas being floated is that network operators should be allowed to offer preferential, high-quality services to some service providers instead of providing a neutral service. What is your position on this issue?

Network neutrality in a democratic society based on law has been defined as non-discriminatory treatment of all legal content within a given network context – treating like circumstances alike. There should be no regulatory or legislative intervention unless there are real examples of abuse which, to date, there have not been. As the Internet evolves, there needs to be room for different business arrangements between network owners and the owners of different kinds of content.

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?

Disney’s various business models suffer from illegal access to our content both offline and online. We work with antipiracy organisations in different content sectors and seek to engage our business partners and customers in promoting legal access to content, including through cooperative measures to address competing unlawful access to the same content we are partnering to promote through legal means.

Illegal network transmission of content is damaging to the intellectual property holder, intermediaries, and ultimately, and most importantly, to the consumer. Unlawful distribution of commercial content competes directly with the authorized broadband services that are the focus of this inquiry. To the extent such illicit competition suppresses opportunity for legitimate entrants in this space, including intermediaries, the result will be less compelling content and fewer choices for consumers. For intermediaries, illegal network transmission consumes huge bandwidth and infrastructure resources that could otherwise be directed to legitimate efforts to

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distribute content online. Legitimate content will flourish online only in an environment where there is trust and accountability. The most pragmatic step to take is to encourage and facilitate effective and expeditious intermediary cooperation to increase consumer choice for legal access to online content and to address parasitic network abuses by subscribers. Distinctions between various types of illegal access as discussed in the past were at best semantic solutions without any real benefits to fostering content online – the real world phenomena will not change just because distinctions are made between “small”, “big”, “upload” or “download”.

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?

Educational campaigns are very important, in particular vis-à-vis the very people engaging in infringing behaviour. Facilitating intermediary cooperation will necessitate enabling intermediaries to warn subscribers whose access is found to be employed in engaging in illegal activity of possible consequences of their acts, such as termination of subscriptions in case of repeat offences through the access granted.

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 distribution is a technology model. It could, in the future, be used in many ways, including enabling legal access to content. As such, it has to compare to other technologies in terms of consumer convenience. One drawback can be that customers are obliged to share their bandwidth when uploading content which, depending on the evolution of the access provider model, can hide the true price of engaging in legal access to content via peer-to-peer technology – in a universe of metered access, uploading becomes “true” sharing because the peer has to actually share something of monetary value to him or her. On the other hand, content could be “closer” to the end customer which can equally have its advantages. Overall, Disney would prefer to deal with companies which have a brand that our company would like to be associated with and which deliver a quality consumer experience - while their growth is based on delivering consumer value. These companies should respect intellectual property rights and copyright protection, value our content and compensate us appropriately. Finally, the partner should make a significant commitment to marketing their products and service and not only rely on leveraging the popularity of our content to drive their sales. To date, many peer to peer implementations have fallen short of a number of these criteria.

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)?

Ratings and classifications are a reflection of local culture and customer convenience and therefore a part of our business. Self regulation has proved to be the most flexible and successful model here.

Digital Rights Management systems (DRMs)

Digital Rights Management systems (DRMs) involve technologies that identify and describe digital content protected by intellectual property rights. While DRMs are essentially technologies which provide for the management of rights and payments, they also help to prevent unauthorised use.

25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?

DRM are an important component of many business models to allow legal access to content online. Content protection has been a constant since the dawn of time– be it a theatre, bookstore or a file with particular usage rules. And while there has been, and must always be, space for creative people seeking an audience while offering their art for free, from street musicians to self-publishers to online blogging, the business of content requires investment to offer attractive products and services and sufficient guarantees to ensure return of investment. Without DRM, infinite replication of near-perfect digital copies is the alternative if access to and copying of works are not protected.

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?

There are various vendors in the market competing for the business. Since they offer products and services, they are seeking return on investment themselves, so availability will depend on capital available. DRM is not a public service utility, but a thriving market with vast opportunities for the European IT and consumer electronics industry.

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?

DRMs are not only widely used, they are enabling numerous new business models to facilitate legal access to content. Content protection has been deployed in what is now covered by the Electronic Communications Framework and in the offline digital and analogue distribution for decades and have found wide market acceptance. The DVD, for example, has been in the market for more than a decade and only very recently have some general interest groups claimed “rights” for particular usages, as in France where the Supreme Court this year addressed these misunderstandings of international, European and French copyright law. Our experience is that

consumers are accepting of DRMs, and in most cases their experience is a seamless one in which DRMs are transparent to them. Most importantly, however, DRM implementations are part of a business strategy that ultimately depends on consumer adoption. To the extent consumers encounter difficulties or dissatisfaction with a particular DRM implementation, the market will react as it does in all aspects of product differentiation.

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?

see above

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

See above

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?

Archives online are a wonderful way to complement commercial offers which presupposes their respect for intellectual property rights of others. One person's "public archive" may contain another person's "long tail", to mention one revenue stream which is likely to continue to be of importance to commercial content providers.

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.)?

As important actors in the value chain, they, too should promote legal access to content in their business to an even greater extent.

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 governments could assist the EU and local stakeholders in finding expeditious and efficient ways to promote legal access to content.

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?

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At the minimum, the Commission should empower intermediaries to cooperate with other stakeholders in efficiently and expeditiously promoting legal access to content, including by giving its explicit approval to intermediaries forwarding warning notices in cases of illegal access to content and ultimately suspending or terminating repeat offenders, without prejudice to more severe options for victims of illegal behaviour to bring criminal or civil actions.