

Digital Rights Management

1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?

2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?

3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?

4) Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?

5) Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?

Joint Answer to QQ 1 to 5: It is worth noting that encryption has been used to ensure that media content is distributed only to authorised users for at least two decades in European pay-TV. So the issues raised are, for broadcasters and our consumers, not revolutionary. As media companies move beyond conventional broadcasting and offer online (streamed, mobile or on-demand) consumption models as additional services (e.g. catch-up TV), so DRM systems will be used for many such services. Among the potential issues are uses in contravention of rights licensed (consumer circumventing a “one-play” offer), P2P copy and distribution of content (NB the perfect quality of digital copies), illegal modification of content (issues for rightsholders) and the analogue hole (digitisation of an analogue output to near-perfect quality).

The task of the industry is to sort out in a fair competitive environment how to make services available online in a secure environment and under reasonable conditions, acceptable for the consumer and the rights holder. This is an ongoing process. DRMs are an appropriate means to secure the distribution of copyrighted material in the

online environment. While no DRM can ever be 100% secure, such systems have so far proved sufficiently robust for online services to be launched by ACT member companies. However, regular software upgrades can help avoid the service operator, in cases where the DRM is hacked, being obliged to suspend the online service – to the ultimate detriment of the legitimate consumer. We suggest that European consumers are increasingly familiar with such measures, given the need to combat piracy in relation to software, television signals, music or online content. Indeed, we would urge a note of caution: the Communication, at p6, states that “consumers must increasingly confront complex contractual terms when purchasing music [...] and are not necessarily fully aware of the usage restrictions applied or the use of their personal data”. Given the popularity with European consumers of downloading music, it would appear that this does not constitute a barrier in practice. Equally, the early signs are that take-up for online services suggests that consumers are interested in online and accept the need for DRM protections.

Multi-territory rights licensing

6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

No – at least not for the distribution of audiovisual media content. It is important to remember that, while the Communication attempts to take a horizontal view of the impact of online distribution on several different content sectors, in fact the scale and nature of the challenges faced are very different as between the sectors.

The Communication estimates that online content will account for 20% of revenue in the music sector and 33% of revenue in video games by 2010. The impact on broadcasting will, according to the Staff Working Paper (at p 12) be of nothing like the same magnitude: the SWP predicts that online distribution of television will account for only 2% of pay-TV revenue by 2010 (the proportion of overall television revenue, taking into account state aid and advertising, will therefore be less than 1%).

The projections included in the SWP are, generally, in line with our experience as operators. Almost all ACT member companies are offering or actively developing online content distribution. Indeed, it is increasingly likely that, with the development of hardware capable of reading both IP and DVB signals, consumers will hardly notice the difference between pay TV / pay per view in DVB standards (via cable, satellite and possibly terrestrial) on the one hand and online VOD on the other, delivered through the Internet, either on the world wide web or in so called walled garden services.

Our member companies are aware of the new business opportunities offered by online distribution of content, and are keen to exploit these wherever consumer research suggests that a rational commercial case can be made. But for most European operators, this is supplementary to, rather than substitutable for, the existing (advertising and/or subscription) revenue streams – indeed, online distribution will be developed precisely to support and enhance the broadcast viewing offer.

Given that the SWP agrees that the impact on the television sector of online distribution will, for the foreseeable future, be evolutionary rather than revolutionary,

we do not consider there is a case for overhauling the current, territorial, model of distribution of audiovisual content.

Indeed, we expect that online services will in the first instance be offered on the same basis as our established broadcast services, i.e., predominantly on a national/linguistic basis. The mainly national structure of European television means that there are few media brands with pan-European consumer appeal, so the commercial potential of European-wide online services may be limited for the time being. Alternative means of distribution may arise when, and if, suitable business models can be developed. If it is the case that the economics of content distribution in the online world turn out to be different, then given the efforts invested by companies in the international distribution market (with 13 000 people attending MIP-TV market, for example) we would expect that the market would evolve so as to facilitate pan-European distribution without the need for regulatory intervention. So far, the actual content delivered online does not significantly vary from content delivered through other means of distribution: we understand online delivery as an additional and alternative mode of distribution which will benefit the consumer in terms of choice of access and convenience of service, rather than developing a new market for the creative content industry

We therefore conclude that specific regulation would be disproportionate (national structure of markets) and unnecessary (should demand exist, contractual agreement is the best way for this to be satisfied). It is of course important, as the European Commission policy in this area develops, to respect contractual freedom : parties should be allowed to negotiate and choose the most appropriate arrangements.

There may however be a case for multi-territory licensing of other forms of content. In our capacity as mass users of music, broadcasters have long argued that the current system of collective rights management is in need of reform. We distinguish between our position on collective music rights administration and our reticence on any regulatory intervention in the distribution of audiovisual content as follows:

- music rights are subject to collective administration – carried out by a network of national/territorial monopolies – while audiovisual content is traded on a commercial basis between individual buyers and sellers;*
- music rights are, for broadcasters, frequently “embedded” in audiovisual content – i.e., it is not possible for a broadcaster to acquire from a distributor the right to show a movie without the film soundtrack. So a system which provides access to the global music repertoire is essential.*
- exclusivity in content is a long-standing cornerstone of media businesses’ commercial strategies, whereas music is distributed according to a different model (a television station will have exclusive rights over a programme, a radio station will typically have no such exclusivity over playing a CD);*
- as mass users of music rights, broadcasters need access to a one-stop arrangement such as that provided by collective management, given the impossibility of individually negotiating clearance for the thousands of pieces of music used every week by broadcasters*

We have several times made clear to the European Commission that, while there are some markets where broadcasters and the local CRM have a good relationship, many

European broadcasters experience significant problems in the operation of the current system, many of which flow from the monopoly status enjoyed by local CRM societies. We will not repeat our previous submissions on these points in this consultation, other than to caution against the possible emergence of separate systems for online and offline licensing. Given that broadcasters, like all mass users, will increasingly simulcast content online and offline, - a trend described in the Commission's Study on Convergence and Interactive Content - we will require a coherent legal regime between the two. For these new activities, there is also a need to obtain copyright licences, and since it is materially impossible to identify and enter into individual contractual arrangements with all relevant right-owners, it follows that the only practical solution is to include those rights in the blanket licences provided by collective management societies.

7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?

As mentioned above, we are confident that the market will evolve to provide a workable model or models if there is meaningful consumer demand for such a system.

We do not believe that a secondary multi-territory market for online distribution is practical or desirable in the field of audiovisual content rights. We assume that the European Commission, in setting up a possible Platform to deal with this issue, will want to learn about potential problems as well as benefits and would like to place our experience as companies buying and selling international licences at the disposal of this Platform.

8) Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?

In broadcasting, archive channels have been successful in meeting such demand as there is for older material. As take-up of multichannel television increases, it may be that suitable content does indeed benefit from a secondary market, which may include some material to which a long tail argument could be applied.

We would however place on record that material which is two years old cannot be considered "back catalogue" if it is subject to successive windows of exploitation. It will typically be the case that, two years after a cinema release of a film, it is still awaiting a free-to-air premiere on television.

Given our overall view that regulation for multi-territory licensing is unnecessary, and the limited application of the long-tail theory to broadcast content, we would regard any regulatory moves to introduce mandatory multi-territorial licences for back-catalogue audiovisual content as disproportionate.

Legal offers and piracy

9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

It is a matter of culture, education and mentality to foster an attitude of respect for copyright, especially from the younger generations, and all stake-holders must invest in preventing illicit behaviour and campaign for effective detection and eradication of piracy, forming alliances to combat the illicit use of protected content. Rightsholders and service providers must work together for the benefit of a world where intellectual property is to be fairly protected.

Innovation and creativity in the media business is affected by increasing levels of piracy and counterfeiting, which threatens Europe's aim of a competitive and vibrant media sector. Television distribution is no exception. Piracy of television content and of television signals must be taken as seriously by governments and the EU as other forms of piracy in the entertainment sector.

Current substantive piracy issues relating to online distribution include:

- a. *The online piracy, from outside the EU, of live sport. This involves the signal of a legitimate rightsholder, maybe an Asian channel who holds the local rights for, e.g., German football, being pirated and uploaded onto the internet. The economic loss here is suffered not by the Asian broadcaster but rather the German rightsholder whose potential subscribers are tempted by the pirated version – particularly as it is easy to watch the Asian video while listening to a German radio commentary.*
- b. *The possibility, brought about by increased broadband penetration and speeds to download TV programmes. According to research carried out by the consultancy Envisional, illegal downloads of the hit series 24 in the UK increased from an average of 35,000 illegal downloads of each episode from series 3 (2003/04) to an average of 95,000 downloads of each episode from the new series 4 (2005/05), an increase of over 150%. Downloads of other series have shown a similar increase. This is already becoming commercially relevant, as 95,000 is a significant number not only in terms of ratings for the show (which determine the advertising revenue) but also in terms of potential subscribers to the pay-TV platform which typically will have had first-run local rights (acquired series tend to follow the same logic as movies in terms of distribution windows). In terms of stakeholder response, the market is already taking steps, with the studios narrowing the window between domestic and international debuts. The recent debut in Australia of the CBS drama "Jericho" within hours of its U.S. launch is an interesting precedent. This is also happening in Europe, with the UK deal for "24" now allowing UK transmission within a week of its U.S. broadcast.*

Obviously, the ACT's pay-TV member companies are particularly concerned with these piracy issues which directly undermine their business models. However, it is important to recall that it is not only pay-TV operators who suffer from piracy. Free-to-air broadcasters can also be subjected to theft of the pre-broadcast signal, with

damaging consequences for the ratings, and therefore the revenue of the affected channels.

10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to followed?

The recent French initiative has the full support of the French audiovisual media sector.

Indeed, the Olivennes Agreement could be considered as an interesting example as inter-industry co-operation. For the first time all sectors involved have signed a common paper to stress their political wish to find a solution for fighting against piracy. The agreement has been signed by 42 signatories from all sectors: broadcasters, producers, telecom operators and ISPs. It shows that a compromise can be found among stakeholders.

However, European media markets are very diverse, not least in the proportion of original and acquired content, and it may be that the French MoU is not necessarily the most appropriate model for other European countries. It may indeed be the case that other national solutions emerge, allowing for an objective comparison between different models, rather than adopting “off the shelf” the French solution for all EU markets. It would be prudent for the European Commission to wait until an assessment can be made of the strengths and weaknesses of the Olivennes system before deciding whether or not it is an example to be followed.

11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

Unfortunately, it is very difficult to ascertain at this moment which filtering measures will effectively work, because copyright infringement is a major source of wealth for those who break the law and profit from so doing. Any kind of mechanism that helps to prevent copyright infringement is a positive step towards achieving online protection, but we know that no such mechanisms have so far been considered bullet-proof, as we answered in QQ 1 to 5 above, and that there will usually be ways to circumvent them.

Hence our emphasis at Q 9 above on educational programmes that change the way young people think and feel towards piracy and copyright breach, as well as media programmes that help fostering such conviction. This does not, of course, replace effective administrative or judicial mechanisms that repress infringement in an exemplary way.

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