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European Commission

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**EDiMA response to the European Commission's Public Consultation on its  
Communication on Creative Content Online**

EDiMA, the European Digital Media Association, is an alliance of new media companies whose members include Amazon, AOL, Apple, eBay, Fnac, Google, Microsoft, Music Choice, RealNetworks, Tiscali, Yahoo! Europe, France Telecom/Orange and many others. EDiMA's members provide new media platforms offering users a wide range of online services, including the provision of audiovisual content, media, E-commerce, communications and information/search services. EDiMA represents the interests of the new media sector in Europe in policymaking, standards development and industry cooperative activities.

EDiMA has consistently contributed to European Commission consultations relevant to the new media sector including the public consultation on Content Online in the Single Market of July 2006, consultations on competition cases and the Commission's 2005 Recommendation on Collective cross-border management of copyright and related rights. The Commission's recent Communication on Content Online is of particular interest and relevance to EDiMA members and the association welcomes and appreciates the opportunity to contribute its expertise and experience to the policy debate.

Accordingly, EDiMA has structured its response into the following sections:

- A. Key messages and points to consider
- B. Communication's conclusions – EDiMA's view
- C. Additional and relevant issues which could have been addressed in the Communication
- D. Answers to specific consultation questions

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## **A. Key messages and points to consider**

In addition to the responses to the Commission's specific questions (see below), EDiMA takes this opportunity to make several broader points related to each of the challenges identified in the Communication which it respectfully calls upon the Commission to consider.

- I. EDiMA is encouraged by the Commission's consideration of self-regulation and industry wide consultation and cooperation. EDiMA firmly believes this is the right approach, along with market driven solutions, to address the challenges arising in the nascent online content market.
- II. Creative content, coming from both traditional and new means, is finding exploitation online. Both types of content provide opportunities and challenges to their respective business models. The purpose of any action in this field should be to ensure the coexistence of the different models and, where possible, to create synergies.
- III. Measures to combat online piracy and measures to encourage innovation are not mutually exclusive – efforts should be made to ensure measures in one area are not detrimental to progress in the other.
- IV. As far as creating a true pan-European market for online content is concerned, the European Commission needs to continue to address the current licensing regime in the EU which is a barrier to the development of Pan-European creative content online services.

### **I. Multi-stakeholder co-operation and self-regulation**

EDiMA welcomes the Commission's consideration of increased, or enhanced, stakeholder cooperation specifically in terms of addressing piracy concerns and copyright infringement, but also with regard to other policy issues impacting the development of the online sector. A case by case approach that promotes industry best practice, voluntary agreements and/or self regulation is often the most appropriate way to address the challenges arising in the online environment. Legislation has the potential to stifle new and evolving business models. As the Commission correctly alludes to in its call for a multi-stakeholder platform, non-legislative approaches, in order to be successful, depend upon wide consultation and involvement of all interested parties across the value chain.

Multi-stakeholder approaches can take many forms including voluntary agreements, codes of conduct, charters, guidelines and harmonised standards. EDiMA notes that self-regulatory measures are common and have generally proved effective in the European content sector. Although not necessarily endorsed by EDiMA or its members per se, illustrative examples of effective self-regulatory efforts relevant to the sector include such arrangements as the PEGI system for self-regulation of games, and the TRUSTe programme and privacy seal, among others. In particular, the extension of the PEGI system to online games, supported by the European Commission, demonstrates the faculty of self-regulation to quickly adapt and address the challenges arising from technological and market developments.

Self-regulation has resulted in guidelines, supported by industry, that are specific to, and appropriate for, each type of online service. Growing the EU online content industry would be well served by continued focus on these types of solutions for digital media and services. We believe that successful examples and experiences should encourage the Commission to continue to offer support for multi-stakeholder approaches and methods of self-regulation as the appropriate tools for achieving policy goals in the area of online content.

### **II. All types of creative content and online business models should be addressed**

EDiMA generally supports the Commission's stated objective of fostering 'the development of innovative business models and the deployment of cross-border delivery of diverse online

creative content services'. Any policy initiatives in this area should, of course, consider and support new and legitimate business models. EDiMA notes that as well as addressing creative content online, the Commission's Communication could have also addressed the particular obstacles faced by emerging players and new business models. In addition, the Commission's identification or definition of 'creative content online' could be more comprehensive - in particular highlighting further the central role that the end user is playing in relation to creation and distribution of content - as is necessary for the purpose of tackling the barriers and obstacles facing the overall content online market in Europe, which should be the focus of any action at EU level.

EDiMA would advise an approach that addresses inefficiencies or barriers which exist to the growth and development of the overall content online market in Europe, rather than focusing on specific content types or challenges faced by traditional business models applied to the online environment. The key drivers of new online content creation are consumer demand, expectation and preference which drive new business models. Ultimately, and as in the off-line environment, consumers choose which platforms will succeed. It is clear that migration of traditional business models into the new media environment may not necessarily always work and new media service providers will only succeed if they meet new users' needs and expectations. Accordingly, EDiMA would encourage policymakers to ensure that innovative and developing business models in the new media sector are not unfairly or unduly restricted. Rather, the focus should remain on developing solutions to the challenges and legislative barriers faced by all players in the value chain.

### III. Measures to combat online piracy

All actors in the value chain, including online service providers are negatively affected by online piracy. EDiMA's members are committed to working with all stakeholders in order to find effective solutions and measures to combat piracy. Online content providers are continuously developing new methods for exploiting content while partnering with rightsholders to simultaneously develop anti-piracy tools. EDiMA believes that a balanced solution should inter alia include: government and industry-led education of consumers, enforcement by rightsholders of their rights, as well as the voluntary development and deployment of technical solutions to assist in tackling piracy. Above all, however, and for the online content industry to truly develop, there is a need to focus on the development of attractive services and business models meeting consumers' needs and expectations, rather than exclusively concentrating on anti-piracy measures.

The current liability regime for internet intermediaries, set out in the E-commerce Directive, represents a delicate balance between the various actors involved in the value chain. Commercial agreements and technical solutions complement the existing legal framework and their promotion and development often represent the most appropriate way to support the development of the online sector and to address the problem of piracy.

### IV. Multi-territory rights licensing

In the context of Commission consultations on competition cases and the Commission's Recommendation on Collective cross-border management of copyright and related rights, EDiMA has consistently identified the current music licensing regime as a major barrier to the development of new online services. EDiMA reiterates here its opposition to all mechanisms in the collective licensing arena that lead to a de facto or de jure carving up of the digital content licensing market along national lines and further underscores its preference for a licensing model based on commercially negotiated licenses on a "willing buyer, willing seller" basis.

EDiMA believes that digital audio and both European consumers and artists would benefit from a one stop shop pan-European licence available from an entity which represents the global repertoire and can offer competitive terms. EDiMA believes that for commercial users, a single

license covering global repertoire is an essential prerequisite for a flourishing creative content industry whereby new businesses are able to offer legitimate services to consumers, provide appropriate remuneration to rightsholders and offer the best possible alternative to piracy.

It is the opinion of EDiMA that the provision of digital content services has been severely stunted by the lack of flexibility in licensing systems that potentially inhibit negotiations between rightsholders and commercial users. The Internet knows no territorial boundaries and yet there is little movement to make licenses available in a way that facilitates the development of multi-country services. This restricts a service provider's ability to exploit the Internal Market and the free provision of services, which has a knock on effect on the number of services rolled out and their subsequent uptake – and is frequently difficult for the European consumer to comprehend. Were an online content provider in a position to procure a licence for distribution across the EU, on the basis of a reciprocal network of licence agreements between collecting societies, the resources and effort spent on procuring up to 50 or more licences could be invested differently; for example, and perhaps notably, on promotion of new and innovative services. In turn, this would drive consumer uptake and enable the European online digital sector to become more competitive and more innovative vis-à-vis its global equivalents, directly impacting the ability to promote European cultural content online.

The Commission's present approach is not working. EMI has taken advantage of the Recommendation to "go it alone". The result is a net increase in licensing requirements to offer a comprehensive service. Moreover, CELAS has, if anything, less transparency than the collecting societies that it seeks to replace. The result is a system that makes it yet harder to develop compelling consumer propositions that are vital to create alternatives to piracy. We believe that it is now time for the Commission to show the promised merits for all parties of option 3 in its own Recommendation or to reconsider its approach to ensure that legitimate music services are at the heart of the information society.

## **B. Communication Conclusions – EDiMA's view**

The Commission's Communication identifies four main horizontal challenges which it believes warrant action at EU-level including: availability of creative content; multi-territory licensing for creative content; interoperability and transparency of DRMs; and legal offers and piracy. Accordingly, the Commission aims to create a multi-stakeholder platform ('Content Online Platform') to discuss and cooperate on the challenges facing the sector and is preparing for the eventual adoption of a Recommendation on Creative Content Online by the Council and the European Parliament.

### **Multi-stakeholder Platform**

As previously stated, EDiMA supports multi-stakeholder cooperation as an effective means of exploring solutions to challenges which affect all parties involved in online distribution and we support the use of self-regulatory regimes in this regard, based on the following principles:

- The presence of a clear mandate and agreed terms of reference for the Platform, appropriate for the fast changing online environment.
- Attendance should be open to all stakeholders, rather than a chosen few, ensuring a balanced representation of the different interests at stake and including rightsholders, consumer groups, new media and information society services and internet access providers.
- Following the completion of the consultation process and not before, a transparent and inclusive method should be used for determining the Platform's composition and ultimate mandate.
- Minutes from all meetings should be made publicly available with the possibility for comment from interested parties.

EDiMA believes it is an ideal candidate to represent the new media information society sector as its members are on the forefront of developing new business models in both providing traditional media through new distribution models as well as entirely new business models, generally referred to as user generated content (UGC).

#### Recommendation on Creative Content Online by the Council and the European Parliament

Although EDiMA acknowledges that the form and content of such a Recommendation will depend on the results of the current consultation, we urge a reasonable and light-touch approach to dealing with these sensitive issues in such a nascent market. Aside from the issue of multi-territory licensing (a Directive addressing the current fragmentation and monopolistic nature of the national provision of territorial licensing in the Internal Market was advocated by EDiMA in previous consultations on this issue), policymakers should focus their attention not on new legislation which could have the potential of introducing additional barriers and less legislative clarity, but on removing existing regulatory obstacles.

Acknowledging the Commission's objectives as outlined in the Communication, EDiMA's suggestion for action follows the logic, where appropriate, of objective '2' ("updating/clarifying possible legal provisions that unnecessarily hinder online distribution of creative content in the EU, while acknowledging the importance of copyright for creation"). With respect to objectives '1' ("ensuring that European content achieves its full potential . . .") and '3' ("fostering users' active role in content selection, distribution, and creation"), EDiMA believes that the current environment has already made tremendous strides towards both of these goals and that a combination of political support and market forces will in due course deliver on these objectives.

Accordingly, in its efforts to meet these objectives and the challenges it has identified, the Commission should take into account the existing benefits already provided by the digital environment and be careful not to unintentionally restrict such progress by seeking to introduce new legislative measures.

#### C. Additional and relevant issues which could have been addressed in the Communication

Although the Communication provides a brief summary of the results of the Commission's previous public consultation on "Content Online in the Single Market", it does not address several of the issues raised in EDiMA's previous submission which we see as essential to achieving the Commission's objectives.

For example, although the Commission has laid out its plans for the creation of a multi-stakeholder platform and preparation of a Recommendation by the Council and the European Parliament, a broader range of potential policy options along with a more detailed identification of the existing barriers and potential remedies, would have enhanced the consultation process and development of effective and appropriate solutions. EDiMA also notes, for example, that the recent Communication does not deal with the issue of levies. The copyright levy is still for the majority of consumers – and even some collecting societies - misinterpreted as a form of compensation for piracy. The amount claimed by the Collecting Societies often reflects the above misinterpretation and consumer associations tend to believe that copyright levies allow consumers to download, copy or use creative content beyond what is effectively allowed under applicable legislation. The European Commission could help by clarifying the limits of the private copy exception and ensure that private copying does not include piracy or illegal downloads and that levies should not be seen as a means to compensate for the losses resulting from piracy.

#### Reform of the European Licensing Regime for digital content

The Commission correctly highlights the challenge posed to the creative content online sector by the lack of multi-territory licences; however, EDiMA believes there is more depth to the issue than that which is presented in the Communication. EDiMA sees this as the largest barrier to the

provision of legitimate multi-territory content offerings. The Communication does not fully address the problem and, thus, understates its significance. Although the Communication does introduce the idea of “Developing a system where right holders would be encouraged to grant, next to the main licence, a second multi-territory licence” and indicates that this “would be one of the issues to be covered in the public consultation in respect of the preparation of a proposal for a Recommendation, as well as an issue for discussion within the Content Online Platform”, current and historic problems regarding European licensing systems not only continue to exist but are not dealt with in the Commission’s current assessment of this topic.

As EDiMA has argued previously, the EU, national governments and regional entities could help foster new business models in the digital environment through various measures, but specifically through the introduction of Pan-European/multi-territory licenses, for example, on the basis of reciprocal agreements between collecting societies with arbitration mechanisms in case of license disputes. Furthermore, effective and transparent resolution of competition cases in the licensing environment and particularly the anti-competitive aspects of collective licensing regimes (in respect of collecting societies and other entities licensing such rights, including the so-called CELAS model) such as those questioned by DG Competition in the CISAC case, would help provide legal security to industry and allow it to take further advantage of the Internal Market.

For an effective pan-European mechanism of cross-border collective rights management to be achieved, and in particular with respect to the digital music market which has the potential to drive other forms of content consumption and which parallels other genres and formats, EDiMA believes it is important to eliminate the inefficiencies, complexities and legal uncertainties in the process of obtaining licenses. There is also a need for greater efficiency in the operation of collecting societies and other entities licensing such rights (including the so-called CELAS model). We believe if these issues can be resolved, this can result in benefits for rightsholders and for service providers by lowering the barriers to the provision of legitimate online content in Europe.

#### Erosion of the underlying principles of the E-Commerce Directive

Several of the important principles enshrined in the E-Commerce Directive have been essential in developing Europe’s content online and digital sectors this far. Despite this we are seeing a consistent erosion of these principles caused by some of the legislative measures which have followed in other related areas. The E-Commerce Directive has provided legal certainty and an essential enabling platform for the evolution of the online market by enshrining two fundamental principles – the country of origin principle and limitation of liability for service providers, in specific circumstances, and with the necessary balances. Under this legal certainty online services have begun to emerge, and are continuously developing (the licensing regime notwithstanding). The E-Commerce Directive must not be encroached upon by other legislation especially that which may diminish the country of origin principle. The definition of Information Society Services, particularly the on-demand provision of service, has allowed Internet services to grow and develop in Europe. However, in the Commission’s Communication, there is no mention of either the Directive or its underlying principles as they pertain to the successful promotion and enhancement of Europe’s creative content online.

#### **D. Answers to specific consultation questions**

The Commission correctly characterises the online creative content market as ‘emerging’ and one in which ‘developments take place at a rapid pace’. Indeed, as the Commission indicates, successful responses to the challenges associated with this nascent sector will be key to growth, jobs and innovation in Europe. EDiMA encourages the Commission to take into account the points and issues raised above as well as those outlined in our response to the specific questions presented below.

## Digital Rights Management

The first five questions here are company specific and EDiMA defers to its individual members and their own submissions for responses to these issues. However, EDiMA supports the role played by market driven solutions in this area and believes that where DRMs are in use, transparency with regard to the applicable restrictions and usage rules for consumers should be promoted and supported.

On the narrow question of interoperability and the evolution of a healthy online environment, digital content distribution requires considerable technical flexibility and while complex in design, should be simple for consumers to make informed decisions based on easily available information. Trying to manage, through regulation, these emerging services and models will stifle innovation and leave rightsholders, service providers and consumers with limited choices and offerings.

*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?*

## Multi-territory rights licensing

EDiMA will answer questions 6 & 7 collectively. Please see below.

*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?*

*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?*

EDiMA has been advocating reform of the European collective rights management system at EU level since the adoption of the Copyright Directive. EDiMA is of the view that developments in

the licensing of music publishing rights for digital services (such as the fragmentation of licensing systems and the licensing of unidentifiable segments of repertoire), following the Commission's Recommendation in October 2005, inhibit the creation of an efficient licensing system and can be barriers to rolling out digital services containing musical content on a multi-territorial or pan-European basis. The experience of EDiMA members, together with the 2008 announcements of alliances between certain major publishers and collecting societies, demonstrate an increasingly fragmented market characterised by legal uncertainty, a lack of transparency, a more complex licensing structure and additional inefficiencies regarding licensing costs and administration. In the introduction, EDiMA identified the backward steps taken with regards to music licensing since the adoption of the Commission's Recommendation, and called for the Commission to demonstrate the merits of its current approach or consider another. Below we outline the alternatives that EDiMA supports.

A pan-European license could be much more resource-efficient both for the digital service provider and the rightsholders if it eases the licensing, reporting and accounting processes. The complexity of the present system of rights clearance is not solved or lessened through the creation of new entities which represent only fragments of repertoire. The major labels have the comparative advantage, in an already developed market, of negotiating and obtaining a pan-European license for their physical formats, such as CDs, from a single society, as well as the further advantage of having a third party agent conduct multi-territorial licensing on their behalf (e.g. IFPI on behalf of the major labels has concluded pan-European licenses and tariffs with BIEM in respect of royalties payable for the rights of music publishers, authors and composers). Companies offering digital services in numerous territories should be entitled, like the four major labels, to benefit from the economies and efficiencies of scale and volume and have the same option as the major labels to obtain a single pan-European license. Online service providers currently must assume the more burdensome and costly obligation of licensing nascent digital services by country, and, as a result of the CELAS model, additionally by segment of publisher repertoire. New entities created to license segments of repertoire (e.g. CELAS and EMI Publishing "Anglo-American" repertoire) have not offered transparent commercial proposals or viable reporting and accounting solutions and have not created efficiencies for industry. Such new entities should be made subject to the same regulatory restrictions and reviews applicable to "traditional" collecting societies.

EDiMA members currently prefer to be able to obtain a single pan-European license for digital music services from an entity which represents all works and can offer competitive terms. In the USA, a company launching a digital download service with content from the 4 major labels needs only 4 licenses: one from each of the 4 major labels. A company launching the same service in a member state within the EU currently requires at least 6 licenses: one from each of the 4 major labels, one from the national societies and one from CELAS for EMI Publishing "Anglo-American" repertoire. A company launching the same service across the EU currently requires 32 to 50 or more licenses: one from each of the 4 major labels, one from each of the 27 groups of national collecting societies and additional licenses from CELAS for EMI Publishing "Anglo-American" repertoire. It is important that both "local" and "Anglo-American" repertoire for the European market be treated equally, enabling rights clearance from one source transparently and efficiently whilst promoting cultural diversity in offers to the public. Therefore blanket licenses are more pragmatic and efficient solutions both for rightsholders and digital service providers, ensuring that substantially all works exploited in such country will be licensed. The approach of licensing by publisher and per segment of repertoire fragments and complicates licensing of music publishing within the European market and brings no benefits for licensees.

For cultural content, it is imperative to achieve the economies of scale enabling the growth and expansion of digital services on a pan-European basis. Any efficiency passed on to commercial users translates into increased capacity to promote a wider offering of content online. It is, therefore, important to enable rights clearance from one source efficiently and transparently, treating the European market as a single market. Commercial users will, however, also need to have the freedom to apply different licensing models and innovative solutions for new business

models around other forms of content. The main problem is simply that no European collecting society is yet able to offer a global repertoire, EU-wide licence. The current reciprocal arrangements specifically carve the market into territorial monopolies, where each society resolves not to provide licences for other territories although it maintains the right to license the entire world repertoire within its own jurisdiction.

Any approach to foster multi-territory rights licensing in the area of audiovisual works must take into account the needs of the user community for truly competitive licensing solutions that enable commercial users to drive innovation and growth to the benefit of all stakeholders in the value chain, while also respecting the fundamental right of rightsholders to choose the manner in which they license their intellectual property. In the absence of effective self-regulatory measures and multi-stakeholder cooperation, which unfortunately have thus far been ineffective on this particular issue, a set of legally binding rules relating to all of the above, such as in the form of a Directive, drafted in consultation with stakeholders, including industry, would lead to greater legal certainty and facilitate the interaction between licensees and licensors in the provision of online music services as well as audiovisual content online. Notwithstanding EDiMA's previously articulated preference for non-legislative approaches to the broader challenges facing the content online environment, without legal certainty in this particular area, licensees are faced with restrictive copyright regimes, which make it a laborious, costly and resource-consuming process to obtain licences and to agree commercially viable rates for new and developing services. The rules or regulations should not be overly prescriptive but should form a framework within which rightsholders, collecting societies and users can operate under a fair, efficient and flexible regime to provide legitimate fully cleared content services to the consumer.

It is important to enable different licensing models to be available according to the needs of each specific business situation. It is of great importance to industry to avoid a situation where the major rightsholders are in practice in a monopoly or a quasi-monopoly position, as that may naturally increase the cost and delay or prevent deployment of new business models.

***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)?***

EDiMA's preferred business model is that of a "willing buyer and a willing seller". Moreover, we recognize that rightsholders cannot license that to which they do not have the rights.

Nonetheless, the evidence to support the notion that there is considerable demand for "tail" content is incontrovertible. For rightsholders not to seek to enable the profitable exploitation of such works would therefore be irrational. Where they do not, this may reflect market failures that warrant investigation and correction, whether by codes of conduct, competition law or regulation. EDiMA is ready to provide the Commission with every assistance to diagnose the issues in the markets for tail content.

In addition, it is important to reduce the cost per transaction in respect of business models based on making available a large number of works and selling a small quantity (if any) of each of those works, in order to create a viable business model offering consumers as much diversity and choice as possible. A key aspect enabling industry to offer consumers this choice depends upon the ability to obtain efficiencies of scale in respect of elements such as licensing, contracting, reporting and accounting. The option to obtain a single pan-European music-publishing license for digital music services from an entity which represents all works and can offer competitive terms could help industry to achieve such efficiencies. Companies offering digital services in numerous territories should be entitled, like the four major labels, to benefit from the economies and efficiencies of scale and volume and have the same option as the major labels to obtain a single pan-European blanket music-publishing license.

## Legal offers and piracy

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

EDiMA supports effective stakeholder cooperation and the promotion of industry self-regulation with regard to the respect of copyright in the online environment. EDiMA recognises and supports the need for all actors in the value chain to work together and cooperate to address the challenges and opportunities that new forms of online distribution present and ensure that consumers enjoy the widest possible choice of legitimate services. EDiMA's members already work closely with actors across the value chain, providing both commercial and technical solutions to these opportunities and challenges.

Ultimately, EDiMA believes that the policy debate around online distribution must aim to tackle piracy, which is detrimental to all actors across the value chain, including ourselves, yet maintain the focus on promoting innovative ways to meet consumer demand and support legitimate services and business models. Policymakers should not seek to determine the business models of rightsholders; instead, they should work with players in the market to explore ways to overcome obstacles to innovation and help leverage the potential of creative content online, thereby giving legitimate creative content more leverage with which to address the threat from piracy. This, therefore, should be the focus of any approach promoted within or outside the remit of a multi-stakeholder platform at EU level.

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

EDiMA notes the Memorandum of Understanding, or "Olivennes Agreement", that has been reached in France between some Internet Access Providers and the content industries but does NOT consider it as an example to be followed. While we believe that multi-stakeholder approaches are the way forward to address the opportunities and challenges of online distribution, we note that this agreement is voluntary and that the signatories to the agreement are principally rightsholders and access providers. EDiMA recognises and supports the need for all actors in the value chain to work together and co-operate to address the challenges and opportunities that new forms of online distribution present and ensure that consumers enjoy the widest possible choice of legitimate services.

The Olivennes Agreement was designed to address the specific needs of the French market and should not therefore set any binding precedents in the specific areas with which it deals. We trust that the French authorities will ensure that any legislative provisions proposed as a follow-up to the Agreement will be consistent with existing European legislation, and notably the E-Commerce Directive, and that, where appropriate, any such initiatives will be notified to the European Commission in line with existing legal obligations. Indeed, any legislative follow-up to the Agreement by the French government would require careful scrutiny by the European Commission to ensure that the delicate balance as regards intermediary obligations and the limitations on liability in the E-Commerce Directive are respected. In particular, the Agreement needs to be assessed from two perspectives:

- Article 15 of the Directive, which prohibits any mandatory "obligation actively to seek facts ... indicating illegal activity". This requires that Olivennes remains a voluntary commitment and does not impose any legal obligations on intermediaries in this respect.
- The limitations on liability in Articles 12-15 of the Directive. This requires explicit confirmation by policymakers that:
  - As regards mere conduits (Article 12), the deployment of technologies to identify copyright protected material does not imply a "selection or modification" of content;

- As regards hosters (Article 14), voluntary deployment of technologies to identify copyright protected material cannot be construed as giving rise to “actual knowledge”. It needs to be recognised that such technologies can never be perfect; some allegedly illegal content will inevitably slip through unbeknownst to the intermediary. In addition, technological means by themselves often cannot make the distinction between what constitutes an infringing use and what does not. The presence of technologies to identify copyright protected material must therefore **not** give rise to a presumption of “actual knowledge” that exposes the service provider to liability. Instead, the existing presumption should remain that it is for the right holder to provide a clear and precise notice to the intermediary of any allegedly illegal content.

EDiMA believes that the approach taken by the Olivennes Agreement may not necessarily be the most appropriate and effective way to address the specific issue of piracy, in particular without directly or indirectly penalising legitimate services that are at the forefront of meeting consumer demand for online services. We trust that the European Commission respects the voluntary and country-specific nature of this Agreement and the fact that not all stakeholders were actually involved in its conclusion.

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

Technology meant to identify copyright protected content, developed on a voluntary basis with the necessary collaboration of rightsholders, can contribute to improving copyright protection in the online environment. When applied at the level of services, with the objective of favouring online availability of content, they may be used to foster innovative content services and business models.

However, the application of filtering measures at the level of communication networks may well achieve the opposite result. The technical feasibility or efficiency of filtering measures at the level of networks is contested and subject to much speculation at the moment. In addition, the possible application of such measures entails important risks for the development of information society services and is marked by additional concerns, specifically with regard to privacy, freedom of expression and intermediary obligations and liability.

Any policy initiatives in the area of technology meant to identify copyright protected material would need to take into account the delicate balance between intermediary obligations and liability as laid out in the E-Commerce Directive. In particular, the conformity of any proposed policy initiatives would need to be assessed with respect to Article 15 of the E-Commerce Directive, which prohibits any mandatory “obligation actively to seek facts ... indicating illegal activity”. The application of filtering technologies would therefore need to remain a voluntary measure.

Despite advances in technology and industry developments, technologies meant to identify copyright protected material, although improving, are still far from perfect. Potentially illegal unauthorised content will inevitably slip through unbeknownst to the party employing these technologies and they may also unintentionally block the legitimate use of content by users falling under the scope of a copyright exception. Accordingly, the presence of filters should not lead to the notion, or presumption, of “actual knowledge” – and, ultimately, liability - on the part of the service provider.

In this context, EDiMA assumes that the European Commission will not take any position on network filtering and its effectiveness to actually “prevent online copyright infringement” before leading an in-depth assessment on its feasibility and potential economic and technical impact. Such assessment should take into account the real costs, effective benefits, and actual risks raised

by the application of filtering at the level of network, as well as its likely effects on innovation and the development of online content services.

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