Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on

creative content online in the single market

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Political and regulatory matters submitted for consultation

Contribution by EUROCINEMA

By way of an introduction, it should be observed that the approach by the European Commission as reflected both in its Communication and in this consultation remains very –too?- all-embracing: in effect, there is no ″online content industry″ as such. By its very essence, the latter is composite: online music rights, press and audiovisual works representing different economies and industries, so that it is not possible to lump together ″online content industry″ in a single paradigm. The comments made here can only be valid for the cinematographic sector and, to a lesser degree, the audiovisual works production sector.

Digital Rights Management (DRM)

Interoperability is a major issue both for consumers and for rightholders. In the absence of interoperability, consumers must be informed of the limits imposed by use control systems[1] applied by DRMs (digital rights management systems), because digitalised contents and readers are increasingly linked within the framework of vertical integration logics such as those of Apple with the iTunes online service (online music service and now video) and iPods (digital audio walkmans and now video).

For rightholders, interoperability is a factor for extension of the potential market in the online environment. But for all that it must not call into question the possibility for them of adequately protecting their digitalised works or justify the circumvention of technical measures introduced to ensure this protection. The development of interoperable universal systems (recital 54 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society) must not call into question this protection or the use of DRM tools allowing, for example, territorial exploitation of rights, the latter constitutes a determinant factor in the economical exploitation of cinematographic and audiovisual works in Europe.

It would seem, however, that as far as the audiovisual and film sector is concerned the problem of interoperability is less acute than for other sectors given the tendency for the development of VOD licences on non-exclusive bases (it will then be possible for the same film to be available on different VOD platforms) and there is less nomadism (e.g. transferring to a walkman) – for the time being at least – than with other types of contents.

As regards alternative dispute resolution mechanisms, it seems that it is necessary to guard against – as far as possible – the introduction of special provisions derogating from the application of the law and referral to the courts, which in any democracy constitute a basic principle in the protection of citizens. Special provisions derogating from application of the law and referral to the courts would simply shift problems elsewhere without necessarily resolving them more effectively. Yet this is the choice that has been made in French legislation through the creation of a new independent authority, the ARMT[2], in a concern quickly to unify case law faced with a dispute felt – wrongly – to be massive. And experience tells us that there is an extremely significant gap between, on the one hand, the passion which sometimes surrounds theoretical debates on interoperability and DRMs and, on the other hand, the reality of the problems encountered and the disputes that are liable to arise from them, which if necessary can perfectly well be settled through the existing legislation[3]. In France, for instance, the ARMT, after more than a year in existence, has not so far had any dispute of this kind brought before it.

[1] This is now expressly provided for in French law – DADVSI of 1st August 2006.

[2] Autorité de Régulation des Mesures Techniques, set up by the DADVSI law of 1st August 2006.

[3] In fact, any disputes relating to the interoperability of DRMS essentially arise from problems concerning competition law and/or intellectual property rights (particularly the link between the protection of technical measures and the private copy exception provided for by the copyright directive of 2001, or even the reverse-engineering exception provided for by the software directive of 1991), which are already the subject of regulation and harmonisation at European level.

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The question of non-discriminatory access for SMEs to DRMs should be seen more as a remedy with a view to combating the propensity of multinationals to develop proprietary systems. Conversely, there should be easier access for SMEs (sharing of know-how, public support for the purchase of licences or patents). This question would merit a thorough examination in Europe where the cultural industries consist of a network of SMEs often without adequate financial means for investments in research and development favouring their growth.

Multi-territory rights licensing

The question of multi-territory licences should be approached with particular caution as far as audiovisual and cinematographic works are concerned, especially if the Commission was to envisage a Recommendation to the European Parliament and the Council. In effect, this is probably a question for which a global (or "horizontal") approach by the Commission, making no distinction as regards the nature of the sector concerned, seems least justified.

The Commission knows the repugnance of the European Parliament concerning a general pan-European licensing system. The Parliament has had occasion several times to demonstrate its disapproval of the recommendation on online music which – according to the European Parliament – has no positive effect when it comes to cultural diversity.

Before even wondering about the appropriateness of a licence for several territories, the Commission should ask itself about the objective that it would be seeking to attain with such an instrument:

a) is it a question of facilitating access for rights to large platforms (mostly non-European) which are trying to aggregate musical, audio and written contents[4]?

b) is it a question of creating leverage with a view to maximising the availability of European content so as to improve the multicultural and multilingual supply of audiovisual and cinematographic works?

If this is the way in which the question of multi-territory licences should be understood, then it is indeed interesting. However, this concept runs up against several facts.

Cinematographic distribution is currently based on exploitation by distribution territories within which the different "windows" (cinemas, DVD, video, VOD and pay-per-view, pay TV, Free TV, etc.) allow scrupulous exploitation of rights (with a view not only to optimisation of income aimed at amortising works but also and above all – particularly when it comes to European works – guaranteeing exclusivities per "window" and per territory allocated to the different media in return for their **pre-financing** of works). The interest of the producer and the distributor is therefore to maximise the increase in income by optimising the number of distribution territories and windows, thus guaranteeing the exclusivities - territorial in particular – granted to each partner or medium involved in the pre-financing of the work.

As we know, in Europe and particularly where cinema is concerned, this distribution is progressive, territory by territory, a sort of patchwork effect which, for widely known films and/or those backed up by large investments in promotion and marketing, leads to all the countries in the Community market being covered.

For this, producers, authors, distributors and sales agents must spare no effort: the presence of films at festivals and the presence of sales agents on film markets are a permanent and continuous duty aimed at selling rights.

Every film is a prototype placed on the market. Whoever makes the best offer (best actors, best scripts, biggest budgets, biggest technical resources, biggest promotion/marketing budgets, etc.) has a chance to win on a competitive market. Not every "film" has the automatic "right" to be distributed and exploited, but must win this right through its own values on a competitive and selective market (every film competes with other prototypes). It should come as no surprise, therefore, that not all the 600 or more European "films" can have access to the cinematographic market (just as not all books or all music have access to the market).

Consequently, it is the territorial exploitation of rights which must be maintained and favoured, which in any case, when considered relevant, does not prevent a licence from being operated by mutual

[4] Given the fact that most "European VOD operators", telcos and traditional broadcasters set up and provide their services within a cinematographic rights distribution territory (which in theory corresponds to a Member State), this supplements the cinematographic rights already available through distribution in cinemas, DVD, Pay TV and uncoded TV within the referenced distribution territory (see the EUROCINEMA/FERA study "The development of VOD in Europe", May 2006 – NPA Council).

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agreement for several territories (as, for example, is frequently the case for a group of territories within the same language region).

The risks with a multi-territory (or pan-European) licence which is not voluntary is quite clear:

- From the supply point of view, the distribution of cinematographic and audiovisual works is covered by exclusive rights administered by contractual agreements (which is legitimate when it concerns prototypes whose value is unique and must be protected to a maximum). It is highly unlikely that distributors and sales agents will give up this currently remunerative economic method for works for the benefit of a multi-territorial licensing system with more than hypothetical effects. Furthermore, as mentioned above, in view of the low rate of capitalisation of European cinematographic and audiovisual production companies, any questioning of the territorial exploitation of rights which forms the basis for the pre-financing of works would immediately lead to a drastic reduction in the production of European works.
- Moreover, from the point of view of demand, “reception" of a film on a given territory implies optimisation of access to the market (with physical agents present and established on the distribution territory to make films available). It is hard to see how a film placed on any online site[5], without any prior promotion and marketing, could find a place on a particular market[6].

As regards online distribution, the NPA study carried out by EUROCINEMA/FERA revealed a major development of VOD sites on a national basis by operators as diverse as telecom operators, TV distributors and access providers. In this respect, the Commission – since it seems attached to better distribution of online cinematographic works – should carry out a study evaluating the presence of non-national European films on VOD sites.

It seems that rather than calling into question a patchwork distribution system (in which VOD is gradually finding a place[7]) it should continue to be strengthened (which the Commission is doing through the Media programme) by providing support so that VOD offers on a territorial basis are as open as possible to the supply of non-national European films (and not support for the creation of VOD platforms themselves, which are created through the effect of the market). As regards recent cinematographic and audiovisual works, it seems difficult to make a distinction between primary market and secondary market.

As for the "long-tail" argument, to have an economic effect it should generate millions of sales of a given work to provide significant remuneration. Otherwise, it can only have an availability effect (cultural effect), important certainly but economically insignificant[8]. Here too, it would be preferable to study the possible "long-tail" effects on the amortisation of cinematographic and audiovisual works as this effect has not been proven so far (absence of relevant data).

Legal offers and piracy

Contrary to what is often said, intellectual property rights receive adequate protection, at both international and Community level. The WIPO treaties on performances and phonograms (WWPT-WIPO Performances and Phonograms Treaty) and copyright (WCT-WIPO Copyright Treaty) offer extensive protection for the distribution and exploitation of cinematographic works in the digital universe[9].

In spite of some ambiguities and an abnormally high list of exceptions[10], the directive on copyright in the information society constitutes the appropriate basis for an extension of protection of works in the digital universe. The Commission’s clearly expressed desire to see telecommunications operators

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5 As the sites themselves are a strategic factor in online visibility. See in this connection the question of the referencing of sites, which implies heavy capital investment to obtain credible referencing.

6 In effect, one of the features of the cinematographic and audiovisual industries is the fact that consumption of works is largely conditioned by their promotion: it is a question of a supply-side economy in which numerous prototypes compete to gain access to the market.

7 As this place is largely conditioned by optimisation of the resources that it generates faced with other windows which currently ensure income (TV, DVD and cinemas).

8 Likening the sector to the book economy (whose production costs are low) must be viewed in relative terms: a few thousand sales online can contribute towards the generation of income for the book, but this is insufficient for a film given the production costs.

9 It should be observed here, however, that the current downward pressure on the protection of intellectual property rights would make it virtually impossible to sign these treaties in the present context (see the revision of the WIPO broadcasting treaty, blocked at the moment yet intended almost exclusively to protect the signal in the pre-broadcast among broadcasters …).

10 Which have been demanded by the Member States ….

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respect IPRs[11] in the revision of the telecoms package currently in course also helps to consolidate the IPR base. But the problems have not yet been resolved.

For instance, the development of high-speed Internet access continues to allow substantial illegal access to protected works and is hindering the development of legal offers of online content. The priority, therefore, is to find appropriate remedies at European level (and concomitantly at world level). At European level, this implies effective implementation of the existing means of protecting rights (directives), in cooperation with all those concerned (telcos, IAPs, cable distributors, rightholders and the public).

But transposition into national law of the directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications 2002/58/EC), the directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce 2000/31/EC), and even the directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC), is introducing numerous uncertainties. The "Bermuda triangle" at the centre of these three directives will have to be **clarified** for the protection of IPRs to be uniform at Community level[12].

Furthermore, the fairly dominant ethos that access to culture must be "free", unconditional and unlimited encourages a drift towards mass access to illegal forms of communication, distribution and reproduction of works, thus wiping out three centuries of patient construction of a system reconciling protection of copyright and general interest[13]. Is this process irreversible?

From this point of view, the efforts by the public authorities in France to reconcile the different points of view and propose socially acceptable remedies to the frenzy of acts of piracy constitute a very positive signal, due to:

- The fact that the involvement of the public authorities (cultural players cannot, without the sword and scales of the Republic, implement the appropriate solutions because the balance of power between them and telecoms operators and access providers is out of kilter). It is up to public action to organise mediation to provide solutions aimed at reducing mass piracy of works. To be effective, this mediation must be sanctioned by the law. Codes of conduct and good practice tested at both national and European level have not produced any obvious results[14].
- The fact that the solution recommended by the agreement is a mechanism for prevention and the education of would-be or confirmed pirates by sending messages warning them about the seriousness of the acts that they are committing and the equally serious nature of the final penalty (suspension of the subscription), a procedure aimed more at dissuading than at penalising.

This solution takes up the idea of “graduated response” which was backed by a very large consensus within the different component parts of French cinematographic and audiovisual creation and even beyond. The balanced conclusions reached in the Olivennes report in France, which concern the conditions for the development of legal online music and film offers, raising public awareness of the question of respect for copyright and the application of a policy of adapted and proportionate penalties, should inspire the measures initiated in other Member States (just as the conclusive experiences of sending warning messages to Internet users in the United Kingdom in particular inspired some of the conclusions of this report).

In theory, introducing filtering measures is an effective way of preventing attacks on IPRs online. Although the Olivennes report - as quoted by the Commission – mentions the complex nature of the application of these measures, the studies and the expertise should be continued so that, especially in the event of failure, the cooperation policies provided for in the above-mentioned agreements can be implemented.

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[11] Provision introduced in the "Authorisation" Directive (Annex 1, point 19) and the "Universal Service" Directive (Article 20 new) currently under examination at the Council and the European Parliament (cf. Commissioner Reding in the presentation of the telecoms directives to the European Parliament, December 2007).

[12] From this point of view, an outstanding example is the transposition by the Member States of the directive on the processing of personal data and the protection of piracy in the electronic communications sector, with some Member States allowing a sort of franchise enabling IPR offenders to be identified and others – the majority – prohibiting such facilities and thus introducing a de facto hierarchy of rights between the protection of privacy and IPRs, the principle of which is debatable (see in this respect the judgment of the CJEC in the Promusicae case).

[13] The IPR protection system has always sought to favour public access (copyright exception for research, education, public domain, etc.).

[14] As clearly shown, at Community level, by the joint discussions between rightholders and telecoms within the context of the proposed online cinema charter).

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