Independent
Film & Television
Alliance®

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Independent Film & Television Alliance ("IFTA") Response to Creative Content Online- Policy/ Regulatory Issues for Consultation

I. Executive Summary

The Independent Film & Television Alliance ("IFTA"- http://www.ifta-online.org) is the trade association for the independent film and television industry worldwide. IFTA has over 180 Member Companies, which are based in 22 countries and license rights to audiovisual works worldwide. The independent film industry consists of those companies engaged in the production and/or distribution worldwide of motion pictures and television programs that are not generated by the five U.S. major studios. It includes those independent productions, even though distributed by a major studio, in which the producer retains a significant ownership interest and is at risk for a significant portion of production costs.

II. Questions & Answers

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?

There is little evidence that fully interoperable DRM systems are critical to achieving mass benefits of the EU Internal Market or that legislation or regulation is needed on this issue. While IFTA welcomes the discussion of secure industry-determined interoperable DRM systems, it notes that DRM is primarily a mechanism to get content to consumers, not a driver of online supply and demand. Essentially, IFTA cautions that to mandate interoperability of DRM systems would shift attention and resources away from issues more directly related to advancing online access to content and services, such as enhancing network speeds and bandwidth capacities, promoting more user-friendly interfaces, ensuring that Member States are fully compliant with EU copyright provisions, etc. This is especially relevant given the continually evolving nature of the products and services available in the digital online world.

Some of the issues raised above relating to consumer online access may also be considered as obstacles to full interoperability. For example, there is inadequate protection of DRM technologies in select EU Member States due to the respective national governments' failure to implement and enforce the technological protection

measures required under the EU Copyright Directive. Any implementation of full interoperability should incorporate and enforce the legal protections for technological measures provided under the EU Copyright Directive. DRM interoperability should not be implemented at the expense of the rights holder and content security.

In particular, interoperability features must still allow rights holders to effectively manage their rights and control access to satisfy consumer demand in order to recoup investment necessary to provide continuity of production. DRM systems must continue to adequately balance the rights holder's ability to exercise control over the distribution and access to their content with the consumer's ability to conveniently access the licensed content.

The primary purpose of DRM is to control distribution rights (i.e., ensure the secure exploitation of content). However, mandating interoperability through regulation or legislation may remove the incentive to create and improve DRM systems. A more effective incentive for creation and improvement exists with healthy competition among DRM-enabling services and among DRM system manufacturers without legislative interference.

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 labeling of digital products and services?

IFTA supports the simplification of information that assists and promotes consumer choice and content appeal. Suppliers, distribution platforms and consumers need clear descriptive material of the content, listing programme title, language, running time, synopsis, etc.

Consumers should have information about the DRM utilized which relates to authorization (or otherwise) to copy, whether for private or other use, to re-distribute or re-sell, etc. Information should also be provided on TPM (technological protection measures), if such measures are utilized in the work. TPMs are useful tools most often employed by content owners to protect their IP against hacking, illegal access or fraudulent re-distribution (e.g. conditional access systems as employed by Pay-TV services) and are clearly necessary in the digital online world. Care should be taken, however, to differentiate DRMs and TPMs so consumers understand how the two

impact legitimate uses and to ensure that neither unintentionally disclose information on circumvention of the protection measures.

DRMs may also provide data on consumer trends in accessing content that may be useful for marketing and tracking purposes. These collateral capabilities should not cause concern to legitimate consumers provided that such capabilities are adequately noticed to consumers and that all data collected (and the manner in which it is collected) complies with applicable laws.

A number of content identifiers are emerging today that may or may not improve identification and availability to consumers. For instance, the International Standard Audiovisual Number ("ISAN"), which provides an internationally recognized and permanent reference number to identify and track a work as well as different versions of the work (V-ISAN), is an important tool that may enable broad rights management systems to be developed and distributed across different consumer devices and territories.

3) Do you agree that reducing the complexity and enhancing the legibility of end-user license 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?

The impact that EULAs may have on the development of online creative content services may best be addressed by software manufacturers and third party licensors of digital rights management and other software used in online distribution. The rights holder would require that any digital rights management software license is consistent with the terms of the license granted to the distributor for the licensed content.

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?

Content owners have every incentive to make product available through exclusive and non-exclusive licenses on terms they negotiate and to meet market demand. Similarly, service providers would not deliberately impede access to content, given the negative impact on their legitimate commercial interests. IFTA does not see a need for alternative dispute resolution mechanisms in relation to the application and administration of DRM systems.

In our view, an ADR process for DRM would not enhance consumer confidence in new online content services or portals nor develop online markets for their content. Effective and efficient DRM systems implementation will ultimately depend on consumer adoption and demand rather than regulatory interference or time-consuming and expensive alternative dispute resolution processes.

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?

Rights holders would like the market place to evolve with as many licensors and distributors for their content as possible. Greater options for licensing provide greater options for the public. The content providers should be allowed non-discriminatory access to DRM solutions. Thus, DRM systems should be readily available. However, this is a competitive consideration for DRM providers and consumers. Any regulatory or legislative interference may chill innovation and limit the rights holder's choices for such systems, which will consequently hurt the consumer.

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?

IFTA strongly disagrees with any proposal that seeks to impose any express or de-facto regulatory, legislated or mandatory multi-territory (regional or pan-European) licensing regimes. Content licensing should remain at the discretion of the rights holders. Any imposed regulation as to how rights holders may exploit their works in the EU will damage the creative economy and negatively impact the quality of products and services made available to EU consumers.

The licensing process of the independent industry is based on informed negotiations and business decisions by rights holders and local distributors taking into consideration many factors, e.g., exclusivity, windows of exploitation, local cultures and customs, languages, as well as the ability to satisfy consumer demand and exploitation in local markets. In many cases, national distributors acquire "all rights," which may include a grant of theatrical, DVD, Pay and Free TV and Internet and wireless rights. The distributors operate national campaigns, with marketing content agreed with the rights holders, that adapt to local, limited screen access, broadcast schedules and "shelf space." This situation would be rendered even more difficult and largely unworkable if,

contrary to industry practice, online content must be licensed on a multi-territorial or pan-regional basis.

Differences exist in the value of a work that is exploited in different EU Member States; therefore, rights holders need the flexibility to respond to different consumer needs in different territories. Licensing must be driven by the individual decisions of rights holders as to the best ways to license their rights to reach a maximum audience and optimal return on their investment. This contractual freedom provides financial incentive to creators, financial institutions, and local distributors (in the form of minimum guarantees paid to the content creators) to invest in new products that in turn will ultimately provide consumers with a wider array of accessible content.

Some may mistakenly consider release "windows" (holdbacks, exclusivity, or sequential release to different markets), individually or in relation to neighbouring countries, as an impediment to access by consumers. It should not be forgotten that coordinated windows of exploitation may be negotiated as a mandatory term of a license agreement or may be nationally legislated. "Windows" provide the local distributor adequate time to create public awareness and/or appeal for the content and to prepare a version for their licensed market such as adding subtitles or dubbing in the local language. In certain instances, the application of windows of exploitation may be a condition of financing production and/or distribution agreements.

Substantial economic reasons exist why independently produced content, i.e., non-major studio produced film and television programs, may not be available for simultaneous online access in a significant number of European countries any more than has been the case in traditional forms of release. Multi-territory release does not account for the significant cost factors that apply to the Independent model. For instance, particular countries may have unique needs, such as territory-specific legal rights clearance requirements (e.g., talent, music, etc.) and marketing considerations (e.g., customs, digital culture, etc.), which require the freedom to stage online release sequentially. While the majority of feature films have usage rights cleared internationally for most anticipated forms of distribution, this is less often true of television programs and independently produced works with low budgets for which a speculative multi-territory "buy out" of talent clearances is not financially viable.

Therefore, IFTA calls for no regulatory or legislative action to be taken on multi-territory online content licensing. The local financial, production and distribution models are coordinated by the rights holders and the distributors, and they are successful in

meeting consumer demand. The industry has done so with the addition of each new format of distribution platforms and is attentive to the emerging needs of the online market.

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 licenses 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?

Chronology of release varies between content and countries, and in the online environment, distribution (and access) may increasingly be licensed on a non-exclusive basis. Thus, once practical revenue models are established, consumers can anticipate an improving degree of choices, which may themselves stimulate ever earlier availability. Always seeking the widest potential consumer audience and highest return on investment, content suppliers have a strong interest in seeing content offered quickly, conveniently and widely. Therefore, these practical and efficient revenue models will be more effectively established by market participants versus government regulations.

As stated above, IFTA strongly disagrees that multi-territory, online rights licensing should be mandatory or regulated. The European Commission has stated – and we fully agree - that it is first for right holders to determine when benefits of multi-territory licensing could emerge.

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 licenses for back-catalogue works (for instance works more than two years old)?

As stated above, content suppliers have a strong economic interest in seeking the widest potential audience and highest return on investment. Again, IFTA believes any discussion of commercializing back-catalogue works would be best addressed by the marketplace.

Legal offers and piracy

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

Effective stakeholder cooperation will improve online rights protection and commerce, which will consequently increase the consumers' choice for legal online content. The Commission should promote and facilitate effective cooperation by the ISPs to help fight online copyright infringement. Each EU Member State should adopt and effectively enforce practical notice and takedown procedures for ISPs, and monitor the compliance and cooperation of the procedures by the ISPs. Currently, there is inadequate protection of DRM technologies in select EU Member States due to the respective national governments' failure to implement and enforce the technological protection measures required under the EU Copyright Directive. Stakeholder cooperation should begin within each Member State.

ISP "codes of conduct" may also be useful in providing consumers with clarity on their rights, but should not substitute for ensuring that Member State legislation adequately implements provisions of the EU Copyright Directive in dealing with unauthorised uploading.

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

IFTA generally supports the idea and intent that gave rise to the Memorandum, i.e., that affected parties convened to develop and agree on pragmatic ways to combat copyright infringement. However, IFTA does not think that that certain provisions in the Memorandum translate well to other jurisdiction and marketplaces. For instance, IFTA disagrees with the Memorandum to the extent that certain agreed upon initiatives may seek to adjust the chronology of distribution windows, impose guidelines on the availability of certain windows of exploitations, or generally inhibit competition or the inherent right of content owners to legally exploit their works as they deem appropriate.

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

The Internet's gatekeepers, the ISPs, have a responsibility to help prevent copyright-infringement on their networks wherever practical and should work with rights holders to create, administer and enforce effective processes to deal with copyright infringement pursuant to local laws. ISPs could adopt and enforce "codes of conduct" that hinder the

use of their networks and services by copyright infringers. Cooperation by the ISPs must ensure a balance between the rights holder's ability to manage their rights profitably and the consumer's ability to access the content conveniently.

Critical in this process are Notice and Takedown procedures to the extent the procedures assist rights holders to effectively enforce copyrights and do not create barriers based on the content itself. ISP could cooperate with rights holders to implement and enforce inexpensive and timely notice and takedown procedures for which filtering measures could be useful tools. However, the ISPs or any notice and takedown process should not act or create unnecessary barriers to or fees upon open access to the Internet by content creators and consumers acting within legal parameters.

III. Contact Information

For any questions on this submission you may contact:

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