



CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET: CHALLENGES FOR THE FUTURE

COMMENTS FROM THE BRITISH SCREEN ADVISORY COUNCIL

8 January 2010

Executive summary

1. We have commented on the very specific proposals that have been suggested in the Reflection Document. We have also provided some important details about the audiovisual sector and factors that need to be taken into account in any debate about content online and multi-territory licensing. The audiovisual sector has in the past grown, and will in the future continue to succeed, by making the most of international markets. The industry has much experience of when multi-territory licensing is likely to be the right option. We are therefore not opposed to cross-border business models in principle where there is sufficient consumer demand to make them commercially appropriate, and we agree that consumer demand must be understood and met as far as possible. For the reasons we have explained, there are many ways of meeting consumer demand, and many issues that need to be taken into account when deciding what type of business models to pursue. Cross-border business models are just one of the choices that may sometimes be appropriate.
2. We do not, however, believe that governments at either national or EU level should take any action that would remove or fetter the audiovisual industry's ability to decide which business models are appropriate in what circumstances. Business models in the online world should be market-determined and the Commission should not intervene on copyright licensing arrangements unless there is evidence of demonstrable market failure.

Introduction

3. The British Screen Advisory Council (BSAC) is well placed to contribute to the debate in Europe on digital content online. BSAC brings together business leaders representing all the segments of the audiovisual value chain in the UK, as well as sectors that are crucial to the success of the industry in the online economy¹. BSAC therefore has the ability to provide comments and make proposals on issues such as content online which take into account a wide variety of perspectives.

¹ BSAC members are listed at <http://www.bsac.uk.com/membership-list.html>

4. BSAC welcomes the opportunity to comment on the Commission's Reflection Document, "Creative Content in a European Digital Single Market: Challenges for the Future". The paper is a helpful contribution to taking the debate about copyright and content online forward. Moreover, the paper shows a good understanding of the need to consider how issues may not always impact in the same way on different types of content. Earlier debates within the EU about content online have tended to focus on music without clearly recognising that business models and licensing practices in this sector will not necessarily apply in the same way more generally. We therefore particularly welcome the recognition in the Reflection Document that there are both synergies and differences between sectors.
5. We also note that the Commission is gathering more information relevant to the audiovisual sector. We await with interest the promised publication in early 2010 of a study to assess options relating to the licensing of audiovisual works. Indeed, seeking comments on the Reflection Document before this important study is available is perhaps somewhat premature. It will be important for there to be an opportunity for stakeholders to input further comments in the light of this study in due course.
6. But the Reflection Document does discuss a number of issues and makes certain assumptions that we do feel it is important to comment on and challenge now. The overriding tenor of the Reflection Document that could be used to support national or EU-wide government interference in markets to deliver multi-territory licensing is particularly worrying. Business models in the online world should be market-determined. Intervention in the market is in general not necessary or appropriate and there is currently no significant evidence of a consumer demand for the same services throughout the EU. We do, however, accept that rights clearance issues for use of music in audiovisual material and for making archive audiovisual material available online should be explored. And action against copyright theft remains a priority.

Background

7. BSAC has provided input to much previous work undertaken by the Commission, including earlier debates about content online and ongoing discussions about copyright in the digital world. BSAC has also been very active in similar policy debates that have taken place in the UK. We wholly endorse the importance of addressing the challenges raised by widespread copyright theft, but also the opportunities to adapt business models in the light of technological developments in the digital and online world. Moreover, regulatory policy and how business models evolve must have regard to changing consumer behaviours and expectations. Making sure that the consumer voice is heard as part of these important debates is something that BSAC was keen to facilitate as far back as 2005. Through our leading role in the organisation of the Creative Economy Conference held that year during the UK Presidency of the EU, we ensured that the agenda of and outputs from that Conference took the views of a wide range of stakeholders into account.

8. BSAC has continued to explore the issues raised in the Reflection Document in various ways. BSAC believes in a regulatory framework where creativity flourishes, and where those with talent and skills are encouraged to work in all parts of the audiovisual sector to help develop new and exciting global businesses. Business models must provide the content consumers want, made available where and how they want it, if there is a sufficient market demand. This clear recognition of the change from a supply-led to a demand-led relationship between content creators and consumers was clearly set out in the report of the BSAC Blue Skies Group².
9. More recently, we have explored the future of copyright in the light of these trends. A key issue identified in the report of the BSAC Blue Skies Copyright Working Group³ was the need for equitable and flexible licensing of rights to be at the core of the copyright framework. Our conclusions were fed into the UK-IPO work stream on the future of copyright. The UK-IPO has recently mapped out its findings from this work and the issues it intends to pursue⁴. We will continue to bring the perspectives of the audiovisual sector to future debates in the UK on these important issues. We have also been actively participating in the various deliberations on copyright currently taking place in the UK under the auspices of the government-appointed Strategic Advisory Board on Intellectual Property.
10. Most recently, BSAC set up a working group to identify where regulatory intervention or support for the audiovisual sector should be prioritised in the UK. The report⁵ published by BSAC looked in particular at the competition framework, enterprise and skills, public service content and copyright, and made a number of recommendations. On copyright, the report identified enforcement of rights, including by co-operation with ISPs and by educating consumers, to be crucial. The report also identified the need for industry to develop more flexible copyright licensing, government facilitation of experimentation with new business models, and a right to “quote” audiovisual content matching that applying to print.
11. BSAC has no doubt that consumers should get ever better experiences when accessing audiovisual content legally in the online world. Our Blue Skies working group outputs have confirmed the need to respond to consumer demand. It is crucial that all stakeholders play their part in developing and delivering legal business models that provide the same or better experiences for consumers than copyright theft. Promoting equitable and flexible licensing of rights is one of the key issues we have identified for making this possible. But how to achieve that objective, including the role of global, EU-wide, language-territory or other licences both now and in the

² See the BSAC Blue Skies Group report published on 2 October 2008 -

http://www.bsac.uk.com/files/BLUE_SKIES_GROUP_REPORT_2008.pdf

³ See the BSAC Blue Skies Copyright Working Group report published on 21 May 2009 -

http://www.bsac.uk.com/files/BLUE_SKIES_COPYRIGHT_REPORT_2009.pdf

⁴ See Copyright the way ahead: Copyright Strategy for the Digital Age 2009 - <http://www.ipso.gov.uk/c-strategy-digitalage.pdf>

⁵ See the report Creativity, Competitiveness and Enterprise in UK Audiovisual: New Vision, New Policies published on 14 December 2009 -

http://www.bsac.uk.com/files/creativity_competitiveness_and_enterprise_report_dec_2009.pdf

future, does, of course, need to be considered with a full understanding of all the relevant factors. We therefore hope that the following comments help those who must now take forward the debate on creative content online within the EU.

Investing in creative content

12. Policy making must take into account how the creation of audiovisual content may be financed in the future. Given the potential impact on investment in different types of content as financing arrangements inevitably change, the Commission should not intervene on copyright licensing arrangements unless there is evidence of demonstrable market failure. The economics of content creation and distribution both now and in the future need to be fully understood. The work commissioned by the UK Government resulting in a report⁶ on the drivers for and barriers to content creation in emerging markets by in particular understanding the value chain and the flow of funds through it is something that we believe would be very useful for the Commission to undertake at the EU level. An analysis of the flow of funds in the EU would give a baseline of what is at stake.
13. Investment in audiovisual content is complicated, and cross-subsidies as a result of profits from successful content hide the fact that not all content leads to a return on investment. We are not saying that consumers must pay for content they do not want, but consumers do need to understand that raising the money necessary for the high value content that they still wish to have requires a return on investment to be realised. Consumers need to appreciate that commercial content can never be free to make or distribute, but it can sometimes feel like “free” in the way it is offered to them.
14. The Reflection Document has not explored the issues relating to financing content production in depth. As we have indicated, though, the impact on investment in content production is something that should be fully understood before any regulatory proposals are taken forward. As new business models are developed and expanded it may be perfectly reasonable for deals on film financing to change. But it would be wrong for governments to encourage any particular types of business model and cross-border licensing arrangements without exploring and understanding how there can continue to be investment in future production of content.
15. An increasing number of online business models are being rolled out. The content industry is being creative and innovative in what it is trying to deliver, either by developing its own services or licensing services operated by others. But consumer expectations of “free” content – fuelled by services reliant on copyright theft – are hard to alter. In this context, making business models financially viable is proving to be very frustrating indeed. BSAC fully supports the continued development of new business models. Innovation in online content delivery mechanisms is just as

⁶ See the report produced by Analysys Mason, Fostering creative ambition in the UK Digital Economy published on 2 May 2009 -

http://www.culture.gov.uk/images/publications/analysismason_fosteringcreativeambition.pdf

important as innovation in the creation of the content. But judging the success of new business models and the types of copyright licensing needed to deliver them must involve, not only looking at what consumers like, but also how business models can provide a return on investment.

16. There is no certainty that new business models will ever be capable of providing the same returns as those from old business models. If that is ultimately the case, and from current evidence this scenario seems very likely, there will need to be adjustments in how much can be invested in content creation, and the size of the royalties that can flow through the value chain. The audiovisual sector must be prepared to react appropriately to these challenges.
17. In considering what consumers might pay for, we need to be aware of the attractiveness of newer types of content. The traditional audiovisual industry cannot ignore consumers' appetite for interactive games, user-generated content and so on. But consumers still enjoy much high value, more traditional content; cinema visits remain high and drama on television is still popular. User-generated content is not, therefore, going to replace expensive content and provide all the audiovisual content that audiences want in the future. The economics of content creation that is expensive to produce is therefore a key issue. The study that has been commissioned by the Commission to assess options relating to the licensing of audiovisual works may therefore need to be treated with caution if it does not also consider the issue of investment in content creation.

Copyright theft

18. The UK report on the drivers and barriers to content creation⁷ showed that 80% of funding for content comes from consumers. This statistic is a stark reminder of the fact that there will be very little funding for content creation in the future if more and more consumers obtain their content illegally. Tackling the problem of copyright theft is therefore a priority.
19. Some consumer groups seem to suggest that copyright theft is only a relevant issue when there are commercial infringers, ie no action is needed, or no sanctions should apply, against non-commercial P2P file sharers. This cannot be an acceptable way of looking at the issue. There is potentially a big loss of income from so-called non-commercial P2P file sharers. The scale of the illegal activity means that it cannot be simply ignored. It is important to remember that commercial audiovisual content is not free to make even if consumers do not pay at the point of delivery. Those commercial operators producing content must be able to decide whether to make something available for free and how they fund its making. But no business model can compete with content that is always free because those making it available have in effect stolen it.

⁷ See footnote 6

20. We agree that there is, however, a need to address how consumers can distinguish between legal and illegal services offering content. More generally, it is important to educate consumers about the value of copyright and why good quality content must be paid for in some way. If consumers do not even know that obtaining content from illegal sources is wrong, it is difficult to stop illegal activity. We would welcome additional engagement on the issue of consumer education from governments at national level, with the Commission encouraging and facilitating this activity too.
21. New business models also, of course, play a part in a reduction of copyright theft. It is, though, wrong for governments to try and impose certain types of business models by justifying they are needed to tackle piracy. It is not essential for legal offers to permit consumers to access content on a cross-border basis because of piracy as suggested by the Reflection Document. If consumer demand can be met by appropriate, but possibly different, business models in different territories then governments should not suggest that this is an unacceptable way of addressing copyright theft. A levy of any sort to compensate for illegal private copying would be an imposed business model too. Moreover it encourages people to think they can then have everything for free. It is also wrong to suggest that a solution to copyright theft is to charge more where people do pay as those people should not be expected to subsidise illegal users. Also, right holders need to have the right to suspend a particular type of service, or use permitted on a particular platform, where that gives rise to unacceptable copyright theft.
22. Regarding the mechanisms for enforcing rights, we do not think there is any cause for concern if there are different solutions to address copyright theft in different Member States. An EU-wide solution could have the effect of constraining attempts to deal with copyright theft. Law enforcement generally varies between Member States and so it is best if Member States come up with their own solutions, ie the ones that work for them. However, an essential part of any solution to enforcement against online copyright theft must be co-operation between right holders and ISPs.

Content online as a separate market

23. There are certain assumptions that seem to underlie the Reflection Document that in our view have not been fully explored. It seems to have been assumed that the market for content online can be looked at separately from other markets for content. The paper examines various issues that may be relevant to making content available online, but a very important omission is that the way the online market might work is in many situations going to be closely linked to other markets, particularly the market for broadcasting of content. This may be of more concern for audiovisual content than other types of content. We do not have the expertise to answer that, but can certainly point out the concerns from the perspective of stakeholders in the audiovisual area.
24. Films produced first and foremost for the cinema are an important part of audiovisual content. But much audiovisual content is produced first and foremost for television.

Moreover, linear viewing of audiovisual content remains popular with consumers, who have, in recent years, been offered more and more choice by broadcasters with the large number of linear channels and the variety of ways they are delivered, namely terrestrial wireless broadcasts, satellite broadcasts and cable transmissions. There is currently no evidence that the popularity of linear television broadcasts is declining. Indeed, recent evidence shows that daily minutes of viewing of television per head in the UK increased by 3.2% from 2007 to 2008 and that television viewing also increased in some other Member States⁸.

25. Of course, consumers find the alternatives to linear transmissions for watching content that has been broadcast very attractive too. The use of personal video recorders to time-shift viewing remains popular. And catch-up television services in the UK have proved to be tremendously popular too. (Catch-up television services have also expanded across the EU.) Indeed, recent research shows that television content is the main driver for video on demand consumption in the UK⁹. Movies only make up about 10% of the online catalogue, and the figures for online viewing of those movies are even lower at only about 3% of what is viewed. In looking at services for making audiovisual content available online it is, therefore, crucial to consider these together with linear television services. The success of video on demand is intrinsically linked to linear television. This gives rise to some very important issues that must be part of any debate about content online.
26. If linear television services are able to be delivered in one Member State, or even just one part of one Member State, their viability could be undermined if catch-up television services must be delivered across all Member States at the same time. In the UK for example, not all of what is broadcast in, say, Scotland, can be received in London, or vice versa. Regional television broadcasts remain popular with some viewers. And much that is broadcast on national television in one Member State is unlikely to be of interest anywhere else. So long as television broadcasts can be made for, and delivered to, a particular region or territory, then it must also be possible to limit any online services for that content the same way.
27. That is not to say that broadcasters and others should not explore the opportunities in the online world of delivering previously broadcast content to different audiences in different regions or territories where there might be a market. We realise that some consumers may like to see some of the content that originates from another Member State. Making that content available online to such consumers may therefore be appropriate and profitable. But this is not the same as requiring or encouraging a uniform multi-territory service with no regard to interactions with how the market for broadcast content is established.

⁸ See Figure 2.31 in particular of the International Communications Report published by Ofcom on 17 December 200 at <http://www.ofcom.org.uk/research/cm/icmr09/ICMRcharts.pdf>

⁹ See the BSAC briefing paper published in December 2009 - http://www.bsac.uk.com/files/tv_platform_vod_2009.pdf

28. Public service broadcasting may, of course, give rise to very particular additional issues where production of the content has been funded by a mechanism specific to one Member State. For example, it may be right to give television licence fee payers in the UK some access online to the content that has been broadcast free-to-air by the BBC without requiring an additional payment (as indeed happens with the 7 day catch-up service provided by the BBC iPlayer). But it would be contrary to the BBC's regulatory obligations to make the content available via the iPlayer accessible in all Member States for free, at the expense of the UK licence fee payer alone.
29. Other ways of exploiting some audiovisual content, such as cinema exhibition and DVD release, are of course also part of the market that needs to be considered when deciding how to exploit content online. Windows, both within a country for different forms of exploitation and between countries, are, as recognised in the Reflection Document, a historical part of how the different forms of exploitation of audiovisual content take place. BSAC fully supports a continued debate within the industry on whether or not, and when, windows are appropriate, and welcomes the evolution that has been occurring on windows as consumer demand evolves. But a simplistic call for day and date release of everything everywhere completely ignores the complexity that must be considered, not least in terms of supporting reinvestment in the delivery structures at each stage of the value chain.
30. For example, as we discuss further below in the section about a single market, the need to trial audiovisual material in one format and/or territory just as supermarkets trial different packaging for physical goods may be the most desirable business model. Also, the importance of dubbing content into different languages so that consumers can enjoy it in their first language could be threatened if day and date release everywhere were always to be the norm. Day and date release would in particular be likely to lead to content from the larger Member States crowding out content from the smaller Member States, and so have a negative impact on cultural diversity, something we discuss further below. Moreover, for the most desired content, experiments with day and date release show that this does not remove copyright theft as there are still those who simply do not want to pay for content.
31. The market must therefore continue to decide where windows are the right option, taking into account consumer demand and other relevant factors, and where day and date release in all territories and/or in all formats might be appropriate. The online market is part of a continuum of release opportunities which the owner of rights should be entitled to determine in any way they like to maximise their return on investment and only subject to any constraints in competition law. Any regulatory intervention on windows is therefore in our view unjustified.

A single market for digital content

32. This is a concept that has been applied to creative content online by the Commission and is continued in the Reflection Document. The desirability of a single market for digital online content may initially seem attractive, but that assumption which

underlies the Reflection Document needs to be looked at critically. First of all, what exactly is meant by a single market for online content is far from clear.

33. A single market for physical goods means that, once the goods have been put on the market in one Member State, they can be moved to and sold in any Member State. But it is only the goods that have actually been put on the market that can be moved across borders this way. Thus, for example, if 100 watches are put on the market in one Member State, then they can be imported into and made available for sale in another Member State, but copying the watches and selling the copies in other Member States is not legal unless that has been licensed by those owning any rights in the watches, the trade marks used and so on. There is therefore not necessarily instant availability everywhere simply because a product has been made available somewhere. Of course, not satisfying market demand by limiting the number of items available for sale will not necessarily make good business sense, and limiting availability of a product may in some cases breach competition law, but it is important to remember that the single market for physical goods does not necessarily mean a completely satisfied market across all Member States. Exclusivity can still be chosen as the appropriate way to market a particular product.
34. For content online, however, the Commission seems to be equating the idea of a single market as a market where all consumers in all Member States have access to the content if they want it. Therefore, the possibility of limiting the number of copies of something that are available does not seem to be a concept that would fit with this view. We are not necessarily saying that those owning rights in digital content would ultimately want to limit who is able to purchase that content online, but, just as with physical goods there may be situations where a limited number of physical items are initially produced for sale in order to test the market say. There may be many situations where marketing based on the concept of exclusivity by limiting the number of people who have access to content online may make sense.
35. As we have said, when physical items are put on the market in one Member State, they can be moved to and sold in another Member State. But the initial deal may be with, say, a very specific store in one Member State to sell the goods there only, with the goods being branded and advertised in a way matched to the location of the sale to maximise their attractiveness to consumers, and so enable a higher price to be charged than might otherwise be the case. Something very different from the single market for goods would therefore be delivered if, for creative content to be made available online, it is not possible to license that to a service provider operating only within one member State. Just as shops may be branded to have an identity that is specifically designed to be attractive to consumers in one member State so as to make the physical products more attractive, a site offering online content may also need to be branded in such a way that is likely to be most attractive to the consumers it is aimed at.
36. As well as choosing the right branding, there may be other reasons for differences between business models in different territories. Business models supported by

advertising must be personalised by advertising chosen to be most effective for the territory to maximise the revenues from advertisers. Indeed, there may be content that can be made available successfully in some Member States by business models supported by advertising whilst in other Member States a subscription model would be more successful.

37. There may also be differences in the attractiveness of streaming services as opposed to download. There may also be differences between audiovisual and other types of content. Consumers may find streaming of audiovisual content attractive as they do not typically watch the same audiovisual content repeatedly in a short space of time. But the recent success of services like Spotify, which streams music, suggests that assumptions such as this may be false. The perhaps unexpected successes, as well as the failures, demonstrate the fluidity of the market, and how only continued experimentation that is not unduly constrained by a rush to a one-size fits all approach on licensing or anything else is so important.
38. Additional reasons that might lead to services being different for different territories include the need to dub audiovisual content into the local language, to make other changes to take account of different regulatory approaches to the protection of minors, or simply to make content more appropriate for local audiences. For content that does not immediately attract a large audience, the efforts needed to promote it, and so the service by which it is available, may have to be localised to one territory or region initially before it makes sense to invest in rolling it out more widely.
39. The Reflection Document has largely avoided any consideration of many relevant issues in concluding that a single online market is the best way forward. An overriding justification for this approach is that there is consumer demand for multi-territory distribution of audiovisual media services. If there is content for which consumers in all Member States want the same content, this does not, however, necessarily equate with content delivered by the same multi-territory service.
40. Moreover, we do not accept that there is such an instant EU-wide demand for much audiovisual content. Demand often needs to be created and encouraged over time, and with regard to the nature of the target audience. Requiring all content online services to be accessible from all Member States would therefore make it much more difficult for those offering content online to maximise their revenues by matching services to audiences. Offering online services would in addition be subject to more constraints in how business models can be set up than applies to physical goods sold from physical premises. Exploitation of content must, of course, be consistent with competition law principles, but there is no justification for any other disruptive change to what is permitted.

Cross border licensing of audiovisual material

41. As we say above, the Reflection Document assumes that the main problem to be solved is how to deliver cross border licensing of content. We agree that, where it is

desirable to deliver the same service to all consumers in all Member States, cross border licensing is necessary. But the Reflection Document seems to conclude for audiovisual content that the rights are often all held by one person, the producer, who can deliver licensing for any chosen geographical area. This is often the case regarding the rights in newly produced content. Thus, there are probably no legal impediments to cross-border licensing of cross-border business models in that those owning the rights can make sure this is delivered when appropriate. But for many reasons, including those we have highlighted in our comments about investment and markets, such business models may not be appropriate, and also not be in the long term interests of consumers. Moving towards mandatory cross-border licensing is therefore definitely not something we support.

42. A different situation does, though, probably exist for archive material, where rights in underlying material may need to be cleared in order to make it available online, and for clearance to use other material in an audiovisual production. Cross-border licensing in these situations may, for the reasons set out in the Reflection Document, be difficult to obtain when that is desirable. Clearing rights in the material included in an audiovisual production to make that content available online can be very complex. For example, the rights that exist are not necessarily uniform across the EU. Not all of those having rights in films in France and Germany generally have rights in the UK. A one size fits all solution to rights clearance is therefore unlikely to work. Moreover, clearing rights in archive material can be particularly challenging. Using evidence from the BBC's 2007 Archive Trial, the BBC has calculated that to clear the whole BBC archive would take 800 staff working for three years continuously, at a potential cost of about £72m for staff alone.
43. We therefore warmly welcome certain initiatives that are looking at issues that may help here, in particular the encouragement of extended collective licensing and facilitating the use of orphan works. Both of these issues were identified in the copyright strategy¹⁰ recently published by the UK-IPO. The proposals on extended collective licensing and orphan works are now being helpfully taken forward in the UK in the Digital Economy Bill. These initiatives should help unlock the potential of culturally and historically important content. They need ultimately to be matched across the EU to facilitate cross border availability of audiovisual content when appropriate.
44. We would also welcome any work to encourage or improve the clearance of rights to use music in audiovisual content. The problems explored in the Reflection Document, including on how rights are split between collective management organisations, can certainly make it more difficult to clear rights to make audiovisual content, which inevitably contains music, available across the EU. But we do not support mandatory collective licensing. Right holders should remain free to decide not to license use of their works when appropriate.

¹⁰ See footnote 4

45. BSAC would therefore support more encouragement for easier and cheaper rights clearance procedures in the situations indicated. Multi-territory licensing for underlying content should be an easy option where the best business model for making the audiovisual product that contains it available online requires this. But, as we have indicated above, the lack of cross border licensing may often not be relevant as cross border services making audiovisual content available to the public are frequently not the ideal. There should certainly not be any rush to impose cross-border licensing as the only option even for underlying content. This does not mean that there cannot be a debate about licensing, and competition issues, in some circumstances. Any debate, though, must acknowledge that business models and value chains can be different, so it will not be appropriate to adopt one way of fixing contracts and licensing which may benefit one business model but not others. Moreover, it is important to remember that competition law findings have not necessarily in the past found exclusivity to be bad. Exclusivity can sometimes be beneficial for consumers, as recognised by the Commission in the Competition Cases relating to sports rights selling (UEFA, Premier League and Bundesliga). In general, therefore, modifying licensing regimes to deliver the flexibility of single and multi-territory licensing as needed should be market-led, facilitated by national governments and the Commission as appropriate.

Sports rights

46. The membership of BSAC includes those having an interest in sports rights and, as for other stakeholders represented by BSAC, they will be providing detailed comments on the Reflection Document about their particular area of interest. However, we feel it is appropriate to make a short comment here specifically about sports rights because this area is only mentioned in the Reflection Document in the context of the very limited evidence that is provided about consumer demand for cross-border licensing.
47. The Commission should provide more details about this evidence of demand across borders for audiovisual transmissions of sport (and other types of content) given some rights owners have had a different experience. For example, when pan European packages have been offered, there has been no demand. The case for multi-territory licensing has not been made for sports rights any more than for any other audiovisual content.

Cultural diversity

48. Ensuring the continuation of cultural diversity in creative content across the EU must be particularly important for the smaller Member States. But even for large Member States like the UK, there is significant cultural diversity within the country. This should be fostered and encouraged to continue, rather than threatened by considering only what might give a good short-term deal for consumers for content wanted by many people. Technological developments provide more opportunities for dissemination of niche content where the market may be small, either on the basis of

the number of consumers who will find it attractive, and/or the region of the EU in which it will be found attractive. We are therefore pleased that the Reflection Document acknowledges the need for a culturally diverse European market.

49. We note with interest that this was an issue explored within the Content Online Platform, but opinion was split on relevant issues¹¹. We agree that the effect of exclusivity versus non-exclusivity is likely to be relevant here, at least for some creative content, and note with interest the tentative conclusion that exclusivity may help foster cultural diversity in the longer term. On the issues of exclusivity and cultural diversity, the Commission might also want to look into the conclusions of the RBB Economics Study from 2009¹²; *“the EU consists of member states with distinct cultural, linguistic and viewing preferences. The European audio-visual industry is organised to accommodate those differences and ensure that a targeted product is made available to European consumers so that stakeholders across the audio-visual industry are more able to recoup their substantial and risky investment in the production and distribution of content. Territorial exclusivity is critical to the practice of accommodating the different viewing preferences within the EU because it enables audio-visual products to be sold within member states on an exclusive basis and in a way which meets demand in each member state within the EU”*.
50. BSAC is fully supportive of the need to maintain cultural diversity within the EU. Given the clear difficulty more generally in knowing how to deliver this, we urge extreme caution regarding any regulatory intervention in the market, or even encouragement of any particular business models, without fully understanding the likely impact on cultural diversity.

An EU copyright law

51. A single, or more uniform, legal framework would not necessarily lead to only multi-territory licensing and cross-border business models. Even with a more uniform legal framework, licensing only more exclusive types of business models, different business models in different Member States and so on may often be the appropriate option for all the reasons we have indicated. We do not, therefore, support working towards a single EU copyright law.
52. One of the arguments in favour of an EU copyright law would be because of the complexity of a large number of national laws. In considering the complexity of the system though, it is important to fully understand the economic issues. From the perspective of an investor, complexity may seem bad because it will increase costs. But complexity can contribute to an increase in value that can be extracted as the

¹¹ See page 6 of the report at http://ec.europa.eu/avpolicy/docs/other_actions/col_platform_report.pdf

¹² “The benefits of territorial exclusivity in the European audio-visual industry”, RBB Economics, London, February 2009 – the quote is from page 30 of the report at

http://www.valuepartners.com/VP_publications/PDF_Communicati/Media%20e%20Eventi/2009/Value-Partners_RBBEconomics_report.pdf

Creative Content in a European Digital Single Market:
Challenges for the Future

Comments from the British Screen Advisory Council, 8 January 2010

content is licensed in different territories, so the impact of any movement towards to a reduction in complexity therefore needs to be considered very carefully.

53. We accept that copyright must provide a balance between the interests of creators and investors in creative content on the one hand and the rest of society. Certain rights to “fair use” must be enshrined in law. Rights to quote, and to be inspired by and build on what has gone before must be part of the social compact provided by copyright law. This is not to say that we think there needs to be a radical roll-back of the protections and incentives afforded to creators and distributors of content as advocated by some interests. Meeting legitimate consumer expectations in the online world must be delivered by continued experimentation with new business models. We have, as indicated above, taken part in various discussions about the future of copyright in the UK and would be pleased to participate in a similar debate within the EU. We have already been active in discussions about some very specific issues at EU level, such as making it easier to use orphan works. Widening out the debate into other areas where the copyright framework might be refined, such as further possible harmonisation of certain exceptions and limitations, is something we would welcome.
54. In addition, we welcome further exploration of the governance and transparency of collective rights management organisations. There is currently a lack of a level playing field across the EU for how collecting societies operate and are regulated. In the UK, additional provision is being put in place by the Digital Economy Bill to require collecting societies to establish codes of practice. This is in addition to the existing regulation provided by the possibility of the resolution of disputes between collecting societies and licensees by the Copyright Tribunal.
55. We do not, however, support the suggestion for a central repository of repertoire as suggested in the Reflection Document. This could create massive costs and end up being a necessary obligation rather than an option for those owning rights. On this, as for other proposals in the Reflection Document, the Commission should only take anything forward where there is demonstrable evidence of market failure and that this is the right solution to that failure.

The satellite and cable Directive

56. There seem to be three relevant issues here. The first is whether there can be a similar rule for online licensing to that in the Directive on licensing only in the country of the satellite uplink. The second concerns the use of encryption to limit consumer access. The third is whether trying to modify the satellite and cable Directive would be an appropriate way of dealing with the first two issues should it be decided that a legislative change at EU level is justified.
57. On the first and second issues, they are linked in that both need to be considered to understand what access is given to content and so what royalties might be due. An uplink type rule for the internet, i.e. that royalties for making material available on the internet should be paid in the country where the internet transmission originates,

would be interesting to explore and we would welcome a dialogue with the Commission on this. But licensing for a satellite uplink must be agreed on the basis of the size of the satellite footprint and encryption used to limit consumer access within that footprint, i.e. by considering the number of consumers that can receive the satellite broadcast. That should be how such a rule would work for making material available on the internet, i.e. the number of territories in which the internet transmission will be available and how technical measures might be used to limit consumer access would need to be assessed. The satellite and cable Directive is not, therefore, a model to follow for forcing the granting of a licence to cover all the EU territories as seems to be suggested in the Reflection Document.

58. On the third issue, online dissemination of content does indeed cover content that is webcast and so amending rules in the satellite and cable Directive may initially seem appropriate. But content made available on demand is the online equivalent of distribution of physical copies and rental, rights that are provided by other EU Directives. The debate about the issues raised in the Reflection Document should therefore not be exclusively linked to the satellite and cable Directive, and amendment of that Directive is not clearly the appropriate vehicle for making provision should legislation be justified.

Conclusion

59. The Reflection Document mentions the possibility of financial incentives, action at national or EU level to facilitate risky experimentation in new business models. This would certainly be welcome. However, it would be premature to contemplate financial incentives directed at only multi-territory online offers of audiovisual works when for all the reasons we have indicated above such business models are only one of those that could be taken forward. In many cases they may not provide the best deal for anyone.
60. We hope to have the opportunity to continue to participate in the debate that will be encouraged by a number of the useful comments in the Reflection Document, including recognition of the real problems due to copyright theft and making new business models work when competing with so much free content. We also look forward to publication of the study that is assessing options relating to the licensing of audiovisual works. We hope that there will be an opportunity to provide additional input to the debate about content online in the light of this study in due course.