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

Response to Commission reflection document

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Intellectual property is an increasingly important pillar of a modern international economy. The EU cannot compete on the cost of doing business with countries such as India and China so we must compete on knowledge and ideas. Building a knowledge based economy depends crucially on the creation, exploitation and protection of IP.

Introduction

The CBI welcomes the opportunity to respond to this reflection paper. A recent CBI survey revealed that over 60% of UK businesses believe that IP has gained in importance over the past five years, while 70% believe it would continue to do so in the next five years.¹ Strong IP protection will be central to achieving this economic vision, of which copyright protection plays a central role.

In this submission, we argue that:

- Copyright based industries make a significant contribution to the economy;
- The copyright framework does not need any fundamental change, it has shown itself to be adaptable and workable over recent years;
- Where issues have emerged they relate to the implementation of the copyright framework in a digital age and should be addressed in a targeted way rather than through wholesale reform of the copyright framework. Measures such as facilitation of cooperation to combat online piracy across industry

sectors, better consumer education about copyright and targeted action to overcome some of the logistical difficulties in clearing rights for commercial uses would be the best way to meet the Commission's three objectives of:

- 1) creating a favourable environment in the digital world for creators and rights-holders, by ensuring appropriate remuneration for their creative works, as well as for a culturally diverse European market;
- 2) encouraging the provision of attractive legal offers to consumers with transparent pricing and terms of use, thereby facilitating users' access to a wide range of content through digital networks anywhere and at any time;
- 3) Promoting a level playing field for new business models and innovative solutions for the distribution of creative content.

¹ CBI IP survey 2009

Copyright based industries make a significant contribution to the economy

The users of copyright are many and varied and include creative industries, training companies, designers, database owners, business to business directories and catalogues, the software industry, business publishing, academic books and sporting events' organisers to name a few. Beneficiaries are not only those that gain economically but also the wider public who benefit socially and culturally from a system that incentivises innovation and creativity.

The creative industries alone provide more than 2 million jobs, and have a value of £60bn to the UK economy.² The importance therefore of having a system that allows industry to operate and compete both within the EU and internationally is clear.

The Copyright framework is not broken

The copyright framework has adapted well for many years. Its inherent flexibility is being displayed in dealing with the increased access to work that digitisation has provided. It is important to note that copyright is about much more than a mere right of remuneration, it is also about the ability to control the use of a creative work. It is the foundation stone enabling the right to choose how your content is used and for economic players, how to conduct your business.

The copyright system has significant strengths:

- It is open, meaning that a creator does not have to register copyright and everyone is protected regardless of their legal knowledge
- It is flexible, as it ensures that value does not have to be determined before protection is granted
- Appropriate risk and reward relationships are in-built
- It assigns ownership to the creator allowing them to control the use of their work as well as allowing them to gain economically
- By being flexible and open it supports enterprise
- It provides wider economic, social and cultural benefit by encouraging distribution

These fundamental principles of the framework are not broken. Where there are issues around access and the digital environment these are to do with implementation rather than the basic principles of the legislation.

Tackling online copyright infringement is key to encouraging new business models

There is a serious issue with online copyright infringement which is doing real damage to some of the creative industries. The Commission rightly identifies that an important part of the sustainable solution to this issue is through the provision of more attractive legal offerings to consumers. The future health of the creative industries will depend on offering products and services to consumers in a way that they wish to receive them and at an attractive price. However, the consultation document is largely silent on the key issue in ensuring the sustainability of new and innovative business models that have been and continue to be launched - online copyright infringement.

The creative industries must continue to invest and innovate to support new commercial offerings for consumers. This is the sustainable way to tackle online copyright infringement in the long-term but the experience of the music industry in the UK over the past five years demonstrates that new legal services alone are not sufficient. In the short-term the scale of online copyright infringement in the EU is undermining the ability of the creative industries to invest in new content and new access methods for consumers. Creative companies have been investing in new business models but the challenge is their sustainability when they are competing with illegitimate sites. Put simply, creative companies cannot compete over the long term with illegal free content.

In order to make the business case for investment in these new models stack up, policy makers should focus on how to tackle the widespread online infringement currently taking place.

Better education for consumers will help to resolve some confusion around acceptable use of copyrighted works

A key issue raised in the reflection paper was about consumer expectations and in some cases confusion about what was legitimate use of copyrighted works. Policymakers have a key role in educating consumers about the basic parameters of the copyright framework.

² Andy Duncan, FT, <http://www.ft.com/cms/s/0/31ce05bo-e661-11dd-8e4f-0000779fd2ac.html>

Governments across the EU could make a useful contribution by ensuring that consumers are aware of the copyright system and how it works. In particular the CBI believes that the public should be made more aware of the value of the copyright system in supporting the work of artists, creators and the many others involved in copyright dependent industries, and how breaching it can damage future production of creative works. This could be particularly useful in tackling illegal copyright distribution.

One suggestion to achieve this would be to introduce the principles of creativity and copyright in schools when children produce their own work. This would teach children the concept of ownership of creative work in a practical way and help to reinforce issues around plagiarism whilst also engendering pride in their work.

The Commission should focus on specific issues of implementation of copyright principles in a digital age rather than on wholesale reform of the copyright framework

As well as stemming the tide of illegal access to content, consumers must have access to attractive legal alternatives. The provision of attractive legal offerings requires an efficient, simple and transparent process to obtain clearance to use works legitimately. It is in the interests of both businesses launching new services and of the underlying rights owners to have an efficient system that allows ownership of rights to be identified. Businesses launching new legitimate services across the EU have complained of the logistical difficulties in contacting many different bodies in many countries in order to clear rights for use across all 27 member states.

It is important to note that different rights have different owners and these need to be respected. It is also important to recognise that rights for different types of creative works, such as music, film, sporting events or books, are different and therefore the solutions need to be sensitive to this especially regarding the territorial dimension of copyright.

In order to address these challenges there are some key areas where we believe the Commission could play a useful role in tackling some of the problems experienced by businesses and consumers across the EU when trying to achieve rights clearance that stop short of full harmonisation of the copyright law. The territorial nature of copyright protection is an important aspect of the current system and altering this would be a seismic and unnecessary reform at the current time.

We believe that the Commission should take targeted action to address practical difficulties in obtaining rights clearance in the following areas:

- Orphan works – the problems caused by not being able to identify, and therefore clear, the rights to use orphan works cause administrative burdens for businesses and consumers trying to utilise and provide legitimate services across the EU. There are a number of ways to address this issue which are worth exploring. Options include: allowing CMOs to licence works with provision made in the event that the rights holder is identified at a later stage; or enabling works to be used provided that due diligence (as defined in regulations) has been undertaken to locate the owner; and greater information provision by copyright offices. In many cases the records held by copyright offices' of renewals, assignments or transfers are only available for relatively recent works. Making the entire database available online would provide greater information on a range of works including those hitherto thought to be orphan works.
- Extended collective licensing – Whilst streamlining the process of rights clearance would be beneficial, many copyright dependent industries do not believe that extended collective licensing is appropriate outside some very specific contexts, such as for orphan works. Copyright intensive industries often see value in collective licensing and choose to engage where the business case dictates but this must be a commercial decision on a case-by-case basis as best suits the respective contracting parties and not one mandated in legislation.
- Facilitating industry lead streamlined licensing processes on a strictly non mandatory basis. There are some areas where copyright holders have seen benefit in creating easily accessible information on who owns various rights to enable streamlined clearance by those wishing to licence them. The recent agreement whereby the music industry's databases have been developed by the collective licensing bodies is a good example. This is positive where it is industry led and is strictly voluntary. One of the key advantages of copyright protection is that it is non registerable and therefore is available to everyone regardless of legal knowledge and ability to afford protection. Where a database facilitates rights clearance by providing greater transparency for licensees then this may have benefits but it must not

be blurred with legal protection which must not become subject to registration requirements.

- The Commission's reflection document also raises the possibility of replacing layers of right for digital music with one "making available" right. This needs to be considered very carefully taking into account the needs of different players within the value chain but is worthy of further consideration. If this idea were to be further explored, the terms attached to the single right at European level would be critical for example compulsory licensing, exceptions to it and enforcement.
- Harmonisation of exceptions - We do not believe that there would be benefit in a general harmonisation of exceptions at EU level. Exceptions were formulated as a de minimis set of rights to overcome practical issues with accessing and using copyrighted works in specific circumstances. They were not seen as a way to give free content to certain groups. It is not clear that there is any rationale for radical changes to the exception regime. Whilst we accept that these exceptions cause complexity in the system, there are commercial contractual arrangements which can be used to agree specific terms to accommodate different circumstances such as the Education Recording Agency example. Commercial solutions should be the preference over rigorous legislative prescription.

There is however one specific example where a more consistent approach to exceptions would be beneficial - the boundaries of the "private copy exception". It would be beneficial to harmonise the maximum scope of private copy exceptions in the EU, so all Member States would have consistent rules, tidying up the fragmentation we have today. To be clear, this is not a call for all Member States to have exactly the same private copy exceptions, but it is a call for the maximum scope of the private copy exception to be defined at EU level. It would still be permissible for Member States to have narrower, but not broader, private copy exceptions within their national laws.

Conclusion:

The copyright framework supports a significant amount of economic activity within the EU providing jobs, economic growth and international competitive strengths in key

industries. The fundamentals of the copyright framework are not broken and do not require fundamental reform.

Where there are issues these relate to implementation of the principles in the digital environment and should be tackled on a specific and targeted basis. The copyright regime supports a wide variety of different types of business from music to film, computer games to publishing and sport. It would be extremely difficult if not impossible to achieve widespread reform that meets the needs of all of these interests and therefore changes should be gradual, targeted and subject to thorough consultation with the variety of different actors involved.

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