Consumer Focus
Campaigning for a fair deal

Consumer Focus response to the Creative Content reflection document

January 2010

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Introduction

Consumer Focus is the statutory independent watchdog for consumers across England, Wales, and Scotland and for postal consumers Northern Ireland[1]. We operate across the whole of the UK economy, persuading Government, businesses and public services to put consumers at the heart of what they do. Consumer Focus also represents UK consumer interests at European and international level and is part of BEUC's digital team and co-chairs TACD Intellectual Property Working Group. We are also working with Consumers International's access to knowledge (A2K) programme and wrote the UK country report for the **2009 IP Watchlist** which compared copyright from a consumer perspective across 16 countries.

The **Creative Content in a European Digital Single Market: Challenges for the Future reflection document** builds on the objectives set in the Digital Agenda published by the Commission in May 2009[2]. Consumer Focus welcomes the intent of the Creative Content reflection document to launch a discussion on concrete options for shaping of the future EU policy. Copyright licensing and law will have a key role to play in establishing a single market in creative content and we welcome the Commission's plan to make this a priority work area.

Copyright law exists to encourage creativity and innovation for the benefit of society as a whole. To do this it needs to achieve balance through the recognition of both the interests of creators and investors, and the interests of consumers. Consumers have an interest in ensuring that innovation is encouraged, and that creators and innovators receive a fair return for their work. However, consumers also have an interest in competitive markets; copyright confers monopoly privileges, which restrict competition and impose costs on consumers. In our view UK and EU copyright law does not currently achieve this balance of interests; private exclusive rights have been over extended at the expense of the consumer and public interest.

Digital technologies have fundamentally transformed the economics of the production, distribution and consumption of creative content, which is regulated by copyright law. Like previous consumer technologies, digital technologies have helped to further diffuse and decentralise the means of cultural production by, for example, increasing access to studio quality recording technology or enabling consumers to assemble their own customised playlists.[3] Beyond that online communication platforms allow consumers and creators to take on roles historically reserved for copyright industries by distributing and supplying creative content. In the long term the market in creative content cannot resist the significance of these technological and cultural developments[4]; and neither can copyright law.

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[1] National Consumer Council, energywatch and Postwatch were merged in October 2008 to establish Consumer Focus. Through our legacy organisation, the National Consumer Council (NCC), we have a long history of representing consumers when it comes to digital and copyright issues and we have committed to intensify our work in these areas.

[2] See for example **Consumer Rights: Commission wants consumers to surf the web without borders**, press release, Europa, 5 May 2009

[3] David Taras, Maria Bakardjieva & Frits Pannekoek, **How Canadians communicate II: media, globalization and identity**, University of Calgary Press, 2007, pg.205

[4] Fiona Macmillan, **New Directions in Copyright Law**, Volume 6, Edward Elgar Publishing, 2008, Pg.270

Consumer Focus believes that the European Commission should adopt an incremental approach to harmonising copyright law across member states. The underlying challenge for the Commission will be to establish a single market in copyrighted creative content that is competitive. The Commission should start the process by establishing pan-European licensing accompanied by pan-European supervision of collectively negotiated tariffs. The complexities of copyright licensing, particularly online, are not only a major obstacle to a single European market in creative content, but also obstruct the emergence of new business models for creative content online. We recommend that the Commission should prioritise copyright licensing and, following on from this work, focus on resolving the uncertainties around copyright exceptions created by the InfoSoc Directive. While we do not take the position that all exceptions should be harmonised we believe that a greater degree of harmonisation is desirable and would allow the Commission to rebalance copyright in favour of consumers and the public at large. A well functioning EU framework for copyright exceptions would in turn provide a solid basis for further harmonisation of copyright law across member states, with the establishment of a 'European copyright law' being the long-term aim.

Licensing

Online database

The Creative Content reflection document raises the possibility of an online database to make information on ownership and licensing freely available. It is thought that such a database will make rights clearance easier. It will also support the operation of multi-territory and multi-repertoire licensing, thus helping to overcome the current market fragmentation. In principle Consumer Focus supports such an approach.

Attempts to create automated Copyright Management Systems (CMS) go back to the 1990s. However, issues with regards to ownership and control of the database have made collecting societies wary of integrating their systems. A unique identifier for each piece of digital music content has been pursued by:

- the Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique (BIEM)
- the Confédération Internationale des Sociétés d´Auteurs et Compositeurs (CISAC)
- the International Federation of the Phonographic Industry (IFPI)
- Recording Industry Association of America (RIAA)[5]

Meta data, which allows for the identification of digital content files, is essential for digital online services as well as consumers. Without it digital music collections will not sync properly with digital media player software such as iTunes or Windows Media Player. MusicBrainz, a user-maintained service, collects music metadata from diverse sources and makes it available to the public, including consumers and businesses such as Spotify[6]. Consumer Focus would like to encourage the Commission to consider an open-platform and open-source solution for the online database.

Recommendation:

- The Commission should consider establishing an open-platform and open-source online database to make information on ownership and licensing freely available

New business models and copyright licensing

In the recently published Digital Britain white paper, the UK Government has acknowledged that the UK licensing system poses a major obstacle to the creation of legal online music offerings.

[5] See CISAC website for details **Smart Metadata: Order in the Digital Chaos**, CISAC, 21 September 2009

[6] **Huge metadata overhaul (or 'Where did my music go?')**, Spotify, 24 April 2008 & **MusicBrainz History**, MusicBrainz.org

It states:

> 'We want creators and creative businesses to be paid but we also want to maximise access to works. Too often the existing systems seem to be breaking down. This impacts on businesses, which cannot get access to works. It impacts on consumers and wider society as it reduces the pool of content that they can legitimately draw from. It also impacts creativity as untapped opportunities mean less recognition and less reward[7]'.

The UK debate on new business models has been driven by the discussion on copyright violation through peer-to-peer file sharing in recent years. Consumer Focus does not condone copyright violation but we see it as an inevitable consequence of the failure to meet consumers' needs and expectations. The only effective solution is new business models that meet consumers' clearly expressed demand for digital services.

Most consumers who violate copyright online are not ideologically driven. If they are able to find what they are looking for legally online, they will not go out of their way to obtain the same content through illicit peer-to-peer file sharing networks; many of which require a high degree of digital literacy. It is encouraging that some of the affected content industries in the UK, such as the TV broadcasters, have made important first steps towards making their content available in ways that appeals to the predominantly young consumers who currently engage in copyright violation through peer-to-peer file sharing[8]. Alice Taylor, Commissioning Editor at Channel 4 television, noted that 'Piracy' – as done by teenagers, all my friends, pretty much everyone I know, is simply demand where appropriate supply does not exist'[9].

The Creative Content reflection document talks of right holders, in collaboration with ISPs and other companies, providing 'access technologies' as a way of enabling more attractive business models. Among others the Creative Content reflection document lists 'an online subscription fee' as an 'alternative form of remuneration' that may be acceptable to right holders, ISPs and consumers'[10]. ISPs are within their rights to offer their customer bundled creative content services where consumers subscribe to a music or movie service in addition to their broadband subscription fee. Similarly ISPs may choose to offer their customers access to creative content services without additional charges to their broadband bill, as done by the Danish ISP TDC since beginning of 2008[11]. But Consumer Focus opposes any suggestion that a blanket online subscription fee should be added to consumers' broadband bills, which would amount to a tax. Significant numbers of EU consumers are financially excluded when it comes to broadband and digital technologies, that is they can either not afford the hardware needed to access broadband, or they can't afford the broadband subscription itself. Broadband take up is highly price sensitive and any increase in broadband subscription costs will lead to a decline in broadband take up among especially low income consumers[12].

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[7] **Digital Britain**, Department for Business Innovation and Skills & Department for Culture, Media and Sport, June 2009, pg.115

[8] Mark Sweney, **YouTube signs landmark deal to screen Channel 4 shows**, The Guardian, 15 October 2009

[9] Alice Taylor, **How do we ensure that creative content and work are accessible to all**, Perspectives, 19 October 2009

[10] **Creative Content in a European Digital Single Market: Challenges for the Future – A reflection document**, DG INFSO & DG MARKT, 22 October 2009, pg.19

[11] **TDC: More than 30 music companies in the PLAY agreement**, TDC, 31 March 2008

[12] For example, the UK Government estimates that the cost to ISPs of their proposed approach to reduce copyright violation through peer-to-peer file sharing networks would lead to an expected increase in broadband retail prices of between 0.2 and 0.6 per cent. In real terms the Government has estimated that what appears to be a small increase would have the permanent effect of reducing demand for broadband connection by between 10,000 and 40,000 in the UK.

In the UK, right holders together with ISPs and access service providers have already launched bundled music services, such as Nokia's 'Comes With Music' (CMW)[13] and the recently launched BSkyB Music service SkySongs[14]. While the verdict is still out on BSkyB's music service, Nokia has publicly acknowledged that its service has failed to catch on with consumers, largely due to confused marketing[15]. Bundled music services are clearly not a panacea and can not detract from the fact that the music industry, who are in the business of selling music, must do more to re-engage consumers. Bundled music services are still in their infancy and the real obstacle to bringing online more such services is not a lack of willingness on the side of ISPs and access technology providers, but the difficulties in clearing the rights to the copyrighted content.

An example of licensing failure in the UK is the long standing attempt by Virgin Media, a provider of broadband, cable TV, landline phone and mobile services provider, to launch a music service. In January 2009 Virgin Media terminated plans to bring a legal file sharing service online for its customers, reportedly because it was unable to reach agreement with the major music publishers[16]. In mid 2009 Virgin Media tried again, announcing its intention to launch an 'all you can eat' subscription service by the end of 2009, specifically targeted at those currently violating copyright through peer-to-peer file sharing networks. However, while Virgin Media gained the support of Universal, other major music publishers did not follow suit and an 'all you can eat' service looks increasingly unlikely[17]. At the beginning of 2010 Virgin Media has still not managed to get its music service online.

Online start-ups, which are responsible for many of the new music streaming services, have run into similar troubles. Rights clearance can be long winded and expensive and the fees charged by right holders may not support a start-up service that still has to build a customer base and advertising revenues. Martin Stiksel, founder of Last.fm, has recently called for cheaper and less complicated online licensing, saying that 'It is a fundamental problem that we have been facing in that online music licensing is getting more complicated and more expensive,' and 'we have to find commercially workable rates otherwise illegal services will win and take over'[18].

Online music streaming services, such as Spotify, Last.fm and MySpace Music, have only been able to gain licences through paying lump sums and/or a share of equity to the major music firms[19]. Consumer Focus is greatly concerned that such arrangements may have a negative impact on competition and disadvantage independent labels. 2009 has seen a number of music artists taking their record labels to court over digital royalties[20] and there is currently a high degree of confusion around digital royalties. The bulk of contracts between creators and publishers were signed before the emergence of digital content distribution.

Digital Britain Impact assessment, Department for Business innovation & Skills, Intellectual Property Office, and the Department for Culture, Media and Sport, November 2009, pg.76

[13] See Nokia's **ComesWithMusic.com**

[14] See BSkyB's **SkySongs.com**

[15] **The 20 key digital music trends in 2009**, Music Ally, 29 December 2009

[16] Andrew Orlowski, **Virgin puts 'legal P2P' plans on ice**, The Register, 23 January 2009

[17] Helienne Lindvall, **Behind the music: Unlimited downloading is a risk worth taking**, The Guardian, 17 December 2009 & **The 20 key digital music trends in 2009**, Music Ally, 29 December 2009

[18] Jane Wakefield, **Last.FM joins Google's rights row**, BBC News, 10 March 2009

[19] All four major labels and super-indie Merlin together own 17.3 per cent of Spotify, either in return for actual money, as advances on royalties, or as some combination of the two.
Eliot Van Buskirk, **Ka-shing! Spotify Investors Include Chinese Billionaire**, WIRED, 21 August 2009

[20] For example see, **My Hilarious Warner Bros. Royalty Statement**, Too Much Joy, 17 December 2009

Hence many contracts do not explicitly cover digital royalties that would arise from, for example, a song being sold as mobile ringtone or as a single on iTunes[21]. Consumer Focus is concerned that the way in which new online streaming services are licensed may circumvent the payment of digital royalties to artists[22] and hence contravene the Commission's stated aim to create 'a favourable environment in the digital world for creators and right holders, by ensuring appropriate remuneration for their creative works'[23].

Recommendations:

- The Commission should assess the impact of current licensing arrangements on competition in the online market for creative content
- The Commission should take forward a review of how licensing arrangements with the various digital music services based on the EU impact on the payment of digital royalties to creators

Extended collective licensing

Nordic countries have operated extended collective licensing for some types of copyrighted works since the 1960s and the system has been shown to work well. Consumer Focus is therefore supportive of the introduction of extended collective licensing at a member state level as well as on a pan-European level. We believe that extended collective licensing could resolve some of the existing complexities of rights' clearance with regards to what the Creative Content reflection document terms 'internet licensing'. Out of print books may be another area were such a system would be of benefit by allowing consumers access to a vast number of works while ensuring that rights owners and authors are remunerated.

Extended collective licensing at pan-European level would be a crucial step towards establishing a single market in creative content. However, this would require each national collecting society to be able to grant a single licence for the whole repertoire of all right holders across member states. Hence the Commission would need to address issues in relation to the governance and transparency of collective rights management organisations, as well as 'digital copyrights', as a matter of urgency.

Issues of collecting societies' governance and transparency are particularly apparent with regard to the way in which levies are imposed and administered across member states, and have raised considerable concerns. Collecting societies enjoy a monopoly in imposing levies and identifying their beneficiaries[24]. Levies are justified under the fair compensation provision in the InfoSoc Directive but collecting societies mostly impose levies on an arbitrary basis that are not justified in terms of the economic damage caused by private copying[25].

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[21] Sean Michaels, **Eminem sues Universal over digital royalties**, The Guardian, 25 February 2009

[22] For an example of the low royalties received by artists from digital services, see royalty statement of the band Too Much Joy (Warner Brothers): **My Hilarious Warner Bros. Royalty Statement**, Too Much Joy, 17 December 2009

[23] **Creative Content in a European Digital Single Market: Challenges for the Future – A reflection document**, DG INFSO & DG MARKT, 22 October 2009, pg.3

[24] See the study carried out by the Italian Consumer Organisation Altroconsumo which provides examples of monopoly situations of collective societies in some member states, available online at: **Creatività fra passato e futuro**, Inchiesta, Altroconsumo, 13 March 2009

[25] See Ruth Towse, Compensating Creators for Use of Copyright, MICA, 12-13 November 2008 & **EICTA Position on COPYRIGHT LEVIES - A European burden for technology companies**, EICTA, 21 November 2003

With regard to the distribution of levies, concerns have been raised both in terms of respecting deadlines for reimbursements by collecting societies and their financial accountability. Consumer Focus supports BEUC in its call for the Commission to adopt common principles and standards governing the supervision of collecting societies through the establishment of independent, regular and expert control mechanisms. Furthermore collecting societies should make publicly available the information related to their tariffs and the level of management costs, as well as the catalogue they represent and the existing reciprocal representation agreements[26].

Recommendations:

- The Commission should seek to establish extended collective licensing at a EU level for the exploitation of content online
- The Commission should commence work on establishing a pan-European regulatory framework for collecting societies, particularly those issuing extended collective licenses

Orphaned works

The problem of access to orphan works is particularly acute for older works. It is more difficult to find out if a work is protected or in the public domain, and to locate owners as records become lost or difficult to access, companies change names, or go out of business, and there is no recent history of exploiting the works commercially. The British Library estimates that 40 per cent of its copyrighted collections are orphaned[27] and the extension of copyright term will amplify the problem. But while we believe that the Commission should work to address orphaned works issues as a matter of urgency, we do not support the introduction of extended collective licensing for orphaned works.

Copyright law ought to encourage creativity by ensuring a fair return to creators and copyright owners. Orphaned works are works that remain protected by copyright but some or all of the right holders can't be located after diligent search. If extended collective licensing schemes were introduced for orphaned works collective rights management organisations would collect a fee for their use, but this fee would not be passed on to the right holder, as he/she can't be located. Extended collective licensing for orphaned works also raises the possibility that collecting societies would license works that are actually in the public domain. We do not believe that collecting societies should be able to extract money for the use of orphaned works or public domain works.

The adoption of a statutory approach is preferable and the introduction of a statutory exception into copyright legislation as suggested by the Copyright in the Knowledge Economy Green Paper[28] would have the benefit of establishing legal certainty across member states and allowing for cross-border access to orphaned works. Furthermore the Commission should consider whether some orphaned works, subject to appropriate safeguards and diligent search, should pass into the public domain.

Recommendation:

- The Commission should not introduce extended collective licensing for orphaned works. Instead the Commission should consider the establishment of a statutory exception on orphaned works

[26] See **Fair compensation for copyright-protected material**, BEUC discussion paper
[27] Sylvie Fodor, **The Situation of Orphaned Works in Europe**, CEPIC, 29 October 2008, pg.3
[28] See, **Copyright in the Knowledge Economy – Green Paper**, Commission of the European Communities

Pan-European licensing, competition and regulation

The Creative Content reflection document proposes the creation of a one-stop shop with the aim of 're-aggregating the manifold layers of different rights and right holders that are contained in a particular work or sound recording and integrating them into a single licence'[29]. The Commission envisages a one-stop shop that would allow 'the rights of authors, composers, music publishers, the producers of sound recordings and the recording artist pertaining to online dissemination'[30] all to be licensed in a single transaction. The licensing process is currently a major obstacle to the emergence of a single market in creative content and we therefore support the establishment of such a facility. The re-aggregation of different rights is essential, but we are concerned that previous efforts to create a one-stop shop have inadvertently led to further fragmentation of rights.

The European Union has promoted the concept of one-stop-shop for multimedia content since the 1990s, funding numerous rights clearance projects such as the Extended Frankfurt Rights Information project (EFRIS), the TV FILES project, the Producer Rights Information System for Audio-visual and Multimedia service (PRISAM) and the Very Extensive Rights Data Information project (VERDI)[31]. In parallel, the Commission has used competition law interventions in an attempt to open up the territorial monopoly of collecting societies, with a view to encouraging a pan-European market for digital music services[32]. However, as a result all four major music publishers have withdrawn their exclusive digital distribution rights from national collecting societies, and set up separate central licensing bodies for the pan-European administration of their respective online rights. There are now four such central licensing bodies - CELAS (EMI, PRS/MCPS and GEMA), PAECOL (Sony ATV and GEMA), Universal (Universal and SACEM) and PEDL (Warner Chappel, with MCPS/PRS, SACEM or STIM). Creating a new online or mobile phone music service now requires a dozen publishing licenses, as well as individual licences for sound recordings which are not collectively managed[33].

Consumer Focus is supportive of the Commission's suggestion that licensing should be streamlined on a pan-European basis. However, it is important to note that under collective management of rights, there is typically only one supplier of licences to the user of copyright works in one particular domain of rights. This lack of competition means that

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[29] **Creative Content in a European Digital Single Market: Challenges for the Future – A reflection document**, DG INFSO & DG MARKT, 22 October 2009, pg.16

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[31] M. Schippan, **Purchase and Licensing of Digital Rights: The VERDI Project and the Clearing of Multimedia Rights in Europe**, vol 22, European Intellectual Property Review, 2002, pg.24

[32] **Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Management of Copyright and Related Rights in the Internal Market**, Commission of the European Communities, 16 March 2004 &
Study on a Community Initiative on the Cross-Border Collective Management of Copyright, Commission of the European Communities, 7 July 2005 &
Commission Recommendation On the Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services, Commission of the European Communities, adopted 12 October 2005 &
CISAC Commission decision, Case COMP/38698, 16 July 2008.
The decision related to proceedings under Art 81 EC and Article 53 EEA Agreement. The decision (currently under appeal) ruled as unlawful restrictive business practices: (i) the membership clause, currently applied by 23 (out of 24 EU CISAC) collecting societies, that prevents an author from choosing or moving to another collecting society; and (ii) territorial restrictions that prevent a collecting society from offering licences to commercial users outside their domestic territory.

[33] **Major changes in the UK Music Publishing Industry**, Clintons Media News, 9 January 2009

market prices cannot form licences to users or services to right holders[34]. Simple solutions, such as automatically making licences acquired in one territory applicable throughout the EU (on the model of the Satellite and Cable Directive[35]) are worth exploring, but do not solve the underlying competition issue relating especially of right holders to indispensable back-catalogues.

Particularly with regards to digital music services entrenched positions have emerged on whether payment for music rights should be calculated as a percentage of overall revenue, advertisement revenue, per song or per user. Essentially the debate revolves around what a fair market rate would be for online music services. Making back-catalogues from a variety of major music publishers and labels available is seen as central to a music service's attraction to consumers. The lack of competition means that right holders to major back-catalogues will be in a strong position to dictate market rates, even if these bear no relation to the revenue an online music services can generate in the short-term or long-term.

By granting exclusive rights copyright confer on the right holder the rights to prevent competition in relation to the subject matter of the rights. From a competition law perspective any single firm which can act substantially independently of its competitors and without regard to consumers is able to exercise monopoly powers. Therefore the Commission has a key role to play in ensuring that the emerging single market in creative content is subject to effective competition and that effective competitive constraints are present in the market[36]. Regulatory oversight of tariffs will be needed and the publication of tariffs would be a welcome first step.

Recommendations:

- The Commission should asses the practices and effects of the emerging pan-European mono-repertoire licences granted by the major publishers
- The Commission should conducts a comparative review of regulatory systems for collecting societies on an international level, with particular focus on how regulatory systems ensure that fair tariffs are set
- The Commission should review to what extent tariffs set by right holders of large back-catalogues should be regulated

[34] R.P. Merges **Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations**, vol 8 no 5, California Law review, 1996, pg.1293
The argument derives from Ronald H. Coase's seminal paper **The Problem of Social Cost**, Journal of Law and Economics, October 1960
For a critique of natural monopoly analysis, see Ariel Katz, **The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights**, vol 1 no 3, Journal of Competition Law and Economics, 2005 & Ariel Katz, **The Potential Demise of Another Natural Monopoly: New Technologies and the Administration of Performing Rights**, vol 2 no 2, Journal of Competition Law and Economics, 2006 &Martin Kretschmer, **Access and Reward in the Information Society: Regulating the Collective Management of Copyright**, Paper first presented at the annual congress of the Society for Economic Research on Copyright Issues, Montreal 2005

[35] P.B. Hugenholtz, **Copyright without Frontiers: is there a Future for the Satellite and Cable Directive?**, Institute for Information Law, University of Amsterdam, 2005

[36] Hector L. MacQueen, Charlotte Waelde, Graeme T. Laurie, **Contemporary Intellectual Property: law and policy**, Oxford University Press, 2007, pg.832-833

Harmonisation of copyright law – exceptions

Consumer friendly copyright law

Despite the increasing relevance of copyright law to their daily lives consumers are provided with hardly any information when it comes to copyright. According to our research 73 per cent of British consumers are 'Never quite sure what is legal and illegal under current copyright law'[37]. The reality is that young consumers, who are often the early adopters, use digital technologies to 'rip, mix and burn' creative content as part of their daily lives with little or no knowledge about copyright.

Consumer Focus is supportive of EU Commissioner Viviane Reading's stated aim to establish 'a simple, consumer friendly legal framework for accessing digital content in Europe's single market, while ensuring at the same time fair remuneration of creators'[38]. The Creative Content reflection document takes a consumer focused approach to copyright law and as such represents a significant and, in our view, very welcome departure. Historically consumers did not need to know about copyright, because in practical terms they were unable to violate copyright on any significant scale before digital technologies became common consumer items. The ongoing development of copyright law takes place in a digital context and we would hence like to encourage the Commission to make consumers, along with creators and copyright industries, a central constituent when drafting new copyright law for the single market.

Recommendation:

- The Commission should take forward work to assess the effectiveness of the current copyright law from consumers' perspective

The InfoSoc Directive

The InfoSoc Directive currently provides for an exhaustive list of 21 exceptions that member states may implement. In addition the InfoSoc Directive provides that 'member states should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation'[39]. However, the legal uncertainty created by the InfoSoc Directive, particularly with regards to 'fair compensation', has hindered attempts in the UK to correct the existing imbalance in copyright law.

The Gowers Review of Intellectual Property, commissioned by the UK Treasury and concluded in 2006, recommended the UK Government implements a tightly defined format-shifting exception for consumers, without accompanying levy as the economic loss to the relevant industries was judged as minimal.

[37] Research undertaken by BMRB for Consumer Focus. Interview conducted among 2026 consumers in the period from 17 to 23 September 2009

[38] **Creative Content in a European Digital Single Market: Challenges for the Future – A reflection document**, DG INFSO & DG MARKT, 22 October 2009, pg.2

[39] **InfoSoc Directive**, Section 38

The IPO consulted on this recommendation end of 2007[40] but has since failed to take the implementation of the format-shifting exception forward. Our understanding is that the music industry's demand for a levy[41] is at the centre of an ongoing controversy. In particular, questions remain whether the UK is able to implement a format-shifting exception without levy under the private copying exception permitted by the InfoSoc Directive, without violating the Directive's provision for 'fair compensation'.

Private copying levies exist in most civil law European Union countries and are commonly imposed on hardware that is used for private copying, such as scanning or recording equipment[42]. Levies were originally established by the German Federal Court of Justice Personalausweise in 1964 on the basis that manufacturers of private recording equipment were liable for contributory copyright infringement. But the request of the German collecting society GEMA for hardware manufacturers to record the names of purchasers of recording equipment was rejected. Alternatively a blanket levy on the import and sale of home recording equipment was thought to respect consumers' fundamental right to privacy[43].

Based on the approach established in Germany many member states operated levies before the introduction of the InfoSoc Directive and while levies are now justified in terms of the 'fair compensation' principle they are in practice entirely divorced from this principle. 'Fair compensation' implied that rights holders are compensated fairly for the economic damage or loss resulting out of private copying. But the actual economic damage arising from private copying has never been quantified[44]. Levies are commonly set on an entirely arbitrary basis and collecting societies distribute the proceeds to right holders on an equally arbitrary basis. This is possible because the InfoSoc Directive does not define 'fair compensation'. Unfortunately the InfoSoc Directive is often interpreted to mean that any private copying ought to merit compensation and that any copyright exception for consumers needs to be accompanied by a levy. Consumer Focus absolutely rejects this interpretation of the InfoSoc Directive. While we believe that creators and right holders should be compensated were an economic damage or loss arises, we take the position that consumers should not be forced to pay what is effectively an arbitrary tax.

Adding to the ambiguity of the 'fair compensation' principle the uncertainty around the application of the 'three step test'[45] has led to an increasingly restrictive interpretation of what consumer exceptions may be implemented at national level. Bizarrely there is no legal certainty on whether a generally worded private copying exception would pass the three-step test as enshrined in the InfoSoc Directive.

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[40] See, **Taking forward the Gowers Review of Intellectual property: Proposed changes to copyright exceptions**, Intellectual property Office, November 2007

[41] For example see the Music Business Group consultation response to the IPO consultation on format-shifting – **Music Business Group Response to UK IPO consultation on copyright exceptions**

[42] Graham Dutfield & Uma Suthersanen, **Global Intellectual property Law**, Edward Elgar Publishing, 2008, pg.239

[43] N. Helberger and P. Bernt Hugenholtz, **No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law**, University of Amsterdam, pg.1069

[44] Mark Rogers, Joshua Tomalin and Ray Corrigan, The economic impact of consumer copyright exceptions: A literature review, November 2009
This literature was commissioned by Consumer Focus. The review examined the existing literature on the possible economic effect consumer exceptions to copyright.

[45] According to Article 5(5) of the Directive all private copying exemptions must comply with the so-called three step test - that is: 'in certain special cases', 'which do not conflict with a normal exploitation of the work' and 'do not unreasonably prejudice the legitimate interests of the right holder.' **InfoSoc Directive**

This is despite broadly worded private copying exceptions already existing in many civil law EU member states at the time Article 9(2) of the Berne Convention was introduced in 1967[46].

We therefore urge the Commission to ensure that any future copyright Directives, particularly on exceptions and limitations, are drafted with a view to create clarity and legal certainty at member state level.

Recommendations:

- The Commission should commence work to clarify the application of the 'fair compensation' principle, as established by the InfoSoc Directive. Specifically the Commission should clarify whether member states can implement a tightly defined exception under the private copying provision without an accompanying levy if the economic damage or loss caused by the private copying is minimal or non-existent
- The Commission should undertake a review of private copying exceptions across members States with a view to establish a proposal for a harmonised non-commercial copying exception for consumers

Harmonising limitations and exceptions

According to the Creative Content reflection document 'unification of EU copyright by regulation could also restore the balance between rights and exceptions – a balance that is currently skewed by the fact that the harmonisation Directives mandate basic economic rights, but merely *permit* certain exceptions and limitations'[47]. Consumer Focus agrees that exceptions to, and limitations on, right holders' exclusive rights are an important mechanism for achieving balance in copyright law. They are the way in which public and consumer fair use rights are expressed. In 'the way ahead: A Copyright Strategy for the Digital Age 2009' the UK Government observed that:

'...the simple, certain basis of UK copyright (the fulfilment of qualifying criteria leading automatically to rights over the work) is not mirrored in an equally simple and certain principle for users, through exceptions or otherwise. Neither the UK's concept of fair dealing nor other countries' approaches such as the US's fair use doctrine seem to deliver such certainty or simplicity in practice'[48].

Despite the promise of the InfoSoc Directive to harmonise and add legal certainty to the European copyright framework, the laws on private copying in the member states still vary enormously, both in scope and legal character[49]. By permitting exceptions the InfoSoc Directive has had a limited effect in terms of harmonisation across member states. For example, UK copyright law is much more limited than required by EU copyright law and UK consumers do not have the benefit of an exception for caricature, parody or pastiche permitted by the InfoSoc Directive. While most EU member states permit some measures of private copying, copying for personal use is generally considered copyright infringement in the UK and Ireland[50].

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[46] Natali Helberger and P. Bernt Hugenholtz, **No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law**, University of Amsterdam, pg.1073
[47] **Creative Content in a European Digital Single Market: Challenges for the Future – A reflection document**, DG INFSO & DG MARKT, 22 October 2009, pg.18
[48] **The way ahead – A Strategy for Copyright in the Digital Age**, Intellectual property Office & the Department for Business Innovation & Skills, October 2009, pg.30
[49] See **Implementation of Information Society Directive**, University of Amsterdam
[50] Natali Helberger and P. Bernt Hugenholtz, **No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law**, University of Amsterdam, pg.1078

This means that anyone copying purchased music CDs or downloads to play on a different music player, an activity known as format-shifting, is infringing copyright. Despite this, many hardware and software companies sell products in the UK specifically designed for consumers to format-shift. Our research shows that 16 per cent of British consumers (aged 15 or older) have format-shifted a CD or DVD they have legally purchased in the past 12 month, among the 15 to 24 age group this rises to 28 per cent[51].

Historically UK copyright law sought to safeguard the interests of the individual user and the public in general by establishing the principle of fair dealing, ie fair use[52]. But today UK copyright law is the law of right holders and only provides for a small number of exceptions for consumers in relation to time-shifting, backing up software and private study. The exceptions provided in UK copyright law are out of step with social norms and technological developments, placing unreasonable and unrealistic constraints on consumers' use of legally purchased creative content. Such legislation cannot command public respect and so brings the law, and the legislative process, into disrepute.

The Creative Content reflection document argues for further harmonisation of copyright limitations and exceptions with a view to 'create more certainty for consumers about what they can and cannot do with content legally acquired'[53]. Consumer Focus supports this proposal and encourages the Commission to move away from merely permitting exceptions. We believe that non-commercial copying and use of copyrighted works by consumers should be a mandated exception to copyright across member states. This would create certainty for EU consumers, as well as businesses that develop hardware and software for the single market. Article 5(2)(b) of the InfoSoc Directive has already introduced the concept of 'commercial' to copyright law at member state level. But because the InfoSoc Directive does not define 'commercial' there remains significant uncertainty with regards to non-commercial institutional users of copyrighted works, such as education establishments and libraries[54].

[51] Research undertaken by BMRB for Consumer Focus. Interviews were conducted among 2026 consumers in the period from 17 to 23 September 2009

[52] Ronan Deazley, **Rethinking copyright: history, theory, language**, Edward Elgar Publishing, 2006, pg.146

[53] **Creative Content in a European Digital Single Market: Challenges for the Future – A reflection document**, DG INFSO & DG MARKT, 22 October 2009, pg.15

[54] Article 5(2)(b) of the InfoSoc Directive allows member states to introduce limitations and exceptions 'in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned'.
With the implementation of the InfoSoc Directive in UK copyright law in 2003 the existing fair dealing exception for private study and research was restricted to 'non-commercial' purposes. Prior to that commercial research, such as a lawyer carrying out legal research for a client fell under the research and private study exception. There is a large amount of ambiguity in the distinction between commercial and non-commercial research, for example in the context of a professor undertaking research as part of her teaching activities and where the research may have non-commercial as well as commercial purposes. However this ambiguity does not extend to consumer use of copyrighted works.
InfoSoc Directive, Article 5(2)(B)
Hector L. MacQueen, Charlotte Waelde, Graeme T. Laurie, **Contemporary Intellectual Property: law and policy**, Oxford University Press, 2007, pg.196-170
http://www.staffs.ac.uk/legal/copyright/eucd/

Consumer Focus does not believe that all exceptions to copyright law should be completely harmonised. The Commission should allow member states to develop new exceptions as permitted by the 1996 WIPO Copyright treaty which, in contrast to the InfoSoc Directive, permits 'contracting parties to devise new exceptions and limitations that are appropriate in the digital network environment'[55].

Recommendations:

- The Commission should start work to establish a definition of commercial and non-commercial use of copyrighted works in the context of copyright exceptions
- The Commission should make non-commercial copying and use of copyrighted works by consumers a mandated exception

User-generated content

Copyright is more relevant than ever for consumers, who are increasingly turned into active users of creative content, not merely passive consumers. A 'Rip, Mix and Burn' culture has taken root where consumers adapt digital works and create what is known as user-generated content, with about 20 per cent of young people in the UK having uploaded user-generated content on YouTube[56]. The Creative Content reflection document observes that 'user-generated content is playing a new and important role, alongside professionally produced content'[57]. And that the 'co-existence of these two types of content needs a framework designed to guarantee both freedom of expression and an appropriate remuneration for professional creators'[58].

User-generated content is frequently shared beyond the domestic sphere by for example being posted on YouTube. This means that user-generated content does not fit easily within what may be termed 'private copying'. Consumer Focus agrees with the UK Government that user-generated content should be covered under a broad exception for 'non-commercial use'[59] which under UK law is defines as 'an act otherwise than in the course of a business' and is not allowed to prejudice the rights owners[60].

User-generated content is frequently hosted by service providers, who are thought to be protected from liability by the 'host principle' as enshrined in the E-Commerce Directive. In recent years the application of the host principle in the case of copyright violation through user-generated content has been repeatedly tested. At the end of 2008 the German Federal Court of Justice confirmed that, in Germany, an online intermediary that has previously been made aware of material on its platform that infringes copyright can be obliged to monitor user generated content for future similar violations. The court decided this even though the E-Commerce Directive, which has been implemented into German law, excludes any general obligation on an online intermediary to proactively search for unlawful user generated content[61].

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[55] **WIPO Copyrights Treaty**, Article 10 and explanatory notes
[56] David Tiltman, New gadgets, same teenage kicks, Marketing Magazine, 24 July 2007
[57] **Creative Content in a European Digital Single Market: Challenges for the Future – A reflection document**, DG INFSO & DG MARKT, 22 October 2009, pg.3
[58] **Creative Content in a European Digital Single Market: Challenges for the Future – A reflection document**, DG INFSO & DG MARKT, 22 October 2009, pg.3-4
[59] **The way ahead – A Strategy for Copyright in the Digital Age**, Intellectual property Office & the Department for Business Innovation & Skills, October 2009, pg.49
[60] **The way ahead – A Strategy for Copyright in the Digital Age**, Intellectual property Office & the Department for Business Innovation & Skills, October 2009, pg.34
[61] Dr Fabian Nieman and Henning Krieg, **Rapidshare required to monitor for user generated content that infringed copyright**, Bird & Bird, 3 December 2008

The e-commerce Directive was not drafted with user-generated content in mind, but its provisions are central to online service providers that host user-generated content. The increasing legal uncertainty surrounding the host principle, and the variations in its implementation across member states, creates significant uncertainty for those service providers that host user-generated content, particularly if they provide platforms for consumers across member states. We would hence like to encourage the Commission to establish clarity on the responsibilities of hosts in relation to user-generated content.

Recommendations:

- The Commission should take forward work on introducing a copyright exception for non-commercial use designed to cover user-generated content
- The Commission should take forward work to clarify how the mere conduit and hosting principle enshrined in the E-Commerce Directive apply with regards to user-generated content and copyright violation by consumers

Contracts and end-user licensing

In its efforts to create a consumer-friendly copyright regime the Commission needs to prioritise end-user licensing agreements. End-user licensing of creative content to consumers in the digital environment frequently occurs through click-through or click-wrap agreements that impose restrictions on the use of content and that limit the rights granted under copyright legislation. Consumers rarely read the multiple pages of small print and, if they do, they are not always in a position to understand what they can and cannot do with the digital content they have purchased. End-user licensing contracts are usually very detailed and they frequently limit the exceptions provided for under copyright law or expand the sphere of control of the right holder beyond those rights granted in law, for example, by asserting an exclusive right to control access to the work[62].

The InfoSoc Directive failed to immunise exceptions against restrictions imposed by contractual agreements but the legal situation varies greatly across member states. Belgium and Portugal are the only member states that have given elevated status to exceptions by immunising private copying against contractual overrides[63]. In implementing the Database Directive Belgium made almost all copyright exceptions mandatory and they cannot be altered or avoided by contractual provisions[64]. Other member states, including France, Italy, and Spain, have made the limitation enforceable against technological protection measures, also known as DRM[65]. Similarly the implementation of the InfoSoc Directive into UK law 2003 led to the 1988 Act being amended to provide remedies in case 'technological measures', such as DRM, prevents users from engaging in activities covered by the exceptions provided in the 1988 Act. Anyone who has been prevented from carrying out a specified permitted act or fair dealing by the application of an effective technological measure can make a complaint to the Secretary of State. However, the Secretary of State is not obliged to do anything in response to such a complaint.

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[62] **Part Three: Copyright and Contract**, Ministry of Economic Development Mantu Ohanga, April 2006

[63] Natali Helberger and P. Bernt Hugenholtz, **No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law**, University of Amsterdam, pg.1078

[64] **Part Three: Copyright and Contract**, Ministry of Economic Development Mantu Ohanga, April 2006

[65] Natali Helberger and P. Bernt Hugenholtz, **No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law**, University of Amsterdam, pg.1078

It may be possible to initiate a judicial review where a refusal to act is unreasonable, but it is far from clear what steps a Secretary of State will in fact take to resolve a complaint under this provision[66].

End-user licensing agreements also raise a number of other concerns, ranging from the transparency of terms and conditions, to the fairness in contracting, the lack of interoperability of content and lack of consumer remedies in case of defective digital content. Digital goods and services are currently inadequately covered by the Consumer Rights Directive and the growing importance of digital technologies and the internet in consumers' lives means that there is an acute need for consumers to have remedies for contracts relating to creative content. Consumer Focus has called for the scope of the current consumer protection legislation to be extended to online content[67].

Recommendation:

- The Commission should immunise exceptions against restrictions imposed by contractual agreements, specifically end-user licensing agreements, or technical protection measures

Technological neutrality

According the Gowers Review of Intellectual Property 'Copyright in the UK presently suffers from a marked lack of public legitimacy... While the law is complex, this is not principally a problem of coherence, but of a lack of flexibility...'[68]. To a large extent the lack of flexibility is due to the fact that many of the exceptions in UK copyright law are technology specific, ie copyright exceptions commonly relate to a specific technology and the law becomes outdated as new technologies emerge. The UK Government has acknowledged as much in 'the way ahead: A Copyright Strategy for the Digital Age 2009':

> 'When governments make rules they often deal badly with technological changes. The Government is alive to this danger: it does not want to see the potential benefit of new technology circumscribed by copyright; nor does it wish to see the copyright system undermined by technology. Instead, it wishes copyright to develop in a technologically-neutral way, and urges other governments to take a similar view. If we do not, copyright will forever be playing catch-up with technology, never meeting the needs of current users or providing any certainty for investors or creators.'[69]

Copyright law, at UK or EU level, can not realistically be updated in step with technological developments, especially given the pace at which new digital technologies become common consumer items. At a national level Consumer Focus has therefore encourage the development of technology neutral copyright law, and we encourage the same at EU level.

Recommendation:

- The Commission should assess to what extent technology neutral exceptions can be used to ensure the continuous relevance of copyright law in the digital age

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[66] Jonathan Griffiths, **UK and European Media Update – Implementation of the Information Society Directive in the United Kingdom and Beyond**, 9 Media & Arts law review, 2004, pg.10
[67] For more information on our work in relation to the Consumer Rights Directive please see:
BERR Consultation on EU Proposals for a Consumer Rights Directive
Committee on Internal Market & Consumer Protection on the Consumer Rights Directive
[68] **The Gowers Review of Intellectual Property**, HM Treasury, 2005, pg.39
[69] **The way ahead – A Strategy for Copyright in the Digital Age**, Intellectual property Office & the Department for Business Innovation & Skills, October 2009, pg.47

Further harmonisation of copyright law

Developing economic rights in the light of digital technologies

In principle Consumer Focus is supportive of establishing an economic right to equitable remuneration. But we are not supportive of simply adding this right to the list of already existing economic rights, as suggested by the Creative Content reflection document[70]. Historically economic rights have been added over time, resulting in piecemeal copyright law that is not fit for purpose. We therefore encourage the Commission to aggregate economic rights as part of a thorough review. The Commission's intent to establish copyright law that supports a single market in creative content is laudable but simply creating additional economic rights will not resolve the fundamental clash between copyright law and digital technologies that currently exists.

The existing economic rights in copyright law across member states seeks to restrict primarily the act of copying, distributing and adapting in a world were 'send', 'attach' and 'copy and paste' have become basic computer functions. This means that existing economic rights are unsuitable to provide a legal and conceptual framework for the commercial exploitation of copyrighted works in the digital age. At a national level Consumer Focus has argued that to ensure the continued relevance of copyright in the digital age, copyright should seek to protect the right to commercially exploit the copyrighted work, or in other words: the right of right holders to make an economic return on their investment.

While on the surface there is a degree of consistency of economic rights across the EU each member state has built their copyright law on different legal and philosophical traditions. This is of particular relevance in a UK context because the UK is one of the few common law countries among the other civil law member states. But beyond the common law and civil law divide different philosophical traditions of copyright amplify the fact that member states currently lack a common understanding of what the purpose of copyright law is. This reflects in the economic rights enshrined in member states' copyright law and it is highly unlikely that all member states would subscribe to the Creative Content reflection document's assertion that 'Copyright is the basis for creativity'[71].

For example, the French 'droit d'auteur' is commonly translated into 'authors rights', which in the UK is frequently equated to moral rights as enshrined in UK copyright law. However, moral rights under UK law are entirely different from what would be recognised as droit d'auteur in France. UK copyright law rests on the Anglo-Saxon common law tradition, according to which creators have a right of ownership in their works and can market this right[72].

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[70] **Creative Content in a European Digital Single Market: Challenges for the Future – A reflection document**, DG INFSO & DG MARKT, 22 October 2009, pg.20
[71] **Creative Content in a European Digital Single Market: Challenges for the Future – A reflection document**, DG INFSO & DG MARKT, 22 October 2009, pg.2
[72] Guglielmo Maisto, **Multilingual texts and interpretation on tax treaties and EC tax law**, IBFD, 2005, pg.216

Copyright, and hence economic rights enshrined in UK copyright law, is treated more as an instrument of trade than as an author's right[73]. By contrast the French droit d'auteur rests on the notion that a work is closely related to its creator[74] and authors have an inalienable right to have their work and their authorship status respected[75].

But even among civil law countries different traditions have led to entirely different approaches to copyright law and systems. For example, in the UK and most other EU countries, creators can assign, ie transfer, ownership of their copyright to other parties, who then become the copyright owners[76]. But German and Austrian copyright law does not allow creators to assign copyright; instead creators can license their economic rights as part of contractual agreements where the creator remains the copyright owner[77]. This particularity originates in the so called monistic theory of copyright which holds that copyright as a whole are creator's rights and are meant to safeguard the economic and personal interest of the creator[78]. 'Urheberrecht', German for copyright, literally translates into 'original creator right'.

The Commission can not hope to resolve these fundamental differences in the way we think and talk about copyright simply by establishing another economic right. Harmonisation of copyright law across member states, or the establishment of 'European copyright law' as suggested by the Creative Content reflection document, will need to be a gradual and incremental process. At the beginning of this process the Commission has to facilitate the establishment of a common understanding of the underlying purpose of copyright.

Recommendations:

- The Commission should assess whether in the digital age restricting primarily the act of copying is the most appropriate way of protecting the interests of right holders and creators
- The Commission should start to work towards a common understanding across member states on the underlying purpose of copyright law

[73] David Vaver, **Internationalising Copyright Law: Implementing the WIPO Treaties**, University of Oxford
[74] Guglielmo Maisto, **Multilingual texts and interpretation on tax treaties and EC tax law**, IBFD, 2005, pg.216
[75] David Vaver, **Internationalising Copyright Law: Implementing the WIPO Treaties**, University of Oxford
[76] Pascal Kamina, **Film copyright in the European Union**, Cambridge University Press, 2002, pg.177
[77] Mireille van Eechoud, **Choice of law in copyright and related rights: alternatives to the Lex Protectionis**, Kluwer Law International, 2003, pg.8
[78] Pascal Kamina, **Film copyright in the European Union**, Cambridge University Press, 2002, pg.177

Consumer Focus response to creative content reflection consultation

If you have any questions or would like further information about our response please contact Saskia Walzel, Policy Advocate, by telephone on 020 7799 7977 or via email: saskia.walzel@consumerfocus.org.uk

In preparing this submission, Consumer Focus has consulted various stakeholders and academics, including Professor Martin Kretschmer, Director, Centre for Intellectual Property Policy & Management, Bournemouth University UK, on pan-European licensing practices.

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Consumer Focus

4th Floor
Artillery House
Artillery Row
London
SW1P 1RT

Tel: 020 7799 7900

Fax: 020 7799 7901

Media Team: 020 7799 8004 / 8005 / 8006