Response to European Commission Consultation
Creative Content Online

Introduction

It is one of the great ironies of the online age that the creative sector has been so badly let down by the lack of creativity and innovation of the "creative industries". As a result, the creative sector has not yet been fully able to profit from the huge opportunities offered by the digital world. EDRi therefore greatly welcomes the focus of the European Commission on the problem of finding ways of ensuring that more content is available online and that continuous innovation ensures that the supply finally meets consumer demand. We welcome the opportunity to provide input on the Commission's policy making on this issue. However, we are also impatient that this process move ahead as quickly as possible as this current consultation is, after all, consulting on the conclusions of a previous consultation.

Commissioner Reding's statement that her priority is 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"* may inadvertently imply a contradiction between these two goals. Lack of a consumer-friendly legal framework results in lack of legally available content which creates the problem of creators not receiving fair remuneration. Illicit access to content must be tackled by addressing the numerous excuses that consumers see every day that render illicit access culturally acceptable.

There is no doubt that a vibrant cultural sector is of importance for EU citizens. However, it is important not to undermine this fact by using statistics that do not bear careful scrutiny. For example, the introduction to the reflection document states that the cultural industries generate 2.6% to European GDP and contribute 3% to the EU workforce. These figures come from a study which has an extremely wide understanding of the "cultural and creative sector", covering, for example, circuses, archeological sites, fashion design and the manufacture of MP3 players.

Removing the justifications

From the time that the Internet started becoming a popular phenomenon until the first usable (but expensive) online music became available, an entire generation of young people grew up. During this time, as the ease of illicit access grew and legal access remained impossible or almost impossible, this generation got used to being vilified by the content industry. Unsurprisingly, therefore, that generation has little or no sympathy for any difficulties that the content industry may have.

Citizens have a well-formed sense of fairness and dislike for discrimination. Seeing somebody being given privileges that are not available to all prompts a negative reaction. So, when Internet users go to, for example, YouTube, BBC iPlayer or Spotify and are told that content available for free to others is not available to them, it is more than a little difficult for them to consider that accessing this content without paying is the "theft" that the various content industry representatives say that it is. Illicit access to cultural content is thus perceived by citizens more as an act of legitimate cultural "self-defence" faced with an inadequate legal copyright environment.

Similarly, consumers, who are generally paid once for whatever job that they do, lose a certain degree of sympathy for the content industry when, for example, they see in Belgium, royalty payments being introduced for (already paid for) music to be played in the workplace – resulting in either new business expenses at a time of economic crisis or their workplace falling silent. Similarly, with the British police complaining about not having enough resources to pay 100,000 UK[1] pounds per year for access to ISP

1 http://www2.kedst.ac.uk/web/support/child%20protection/CEOP%20E-Bulletin%20Jan%20Feb%2009.pdf

records in order to gather evidence on child abuse and the country's police forces simultaneously paying 800,000 UK pounds[2] in royalty payments for music played in the workplace, sympathy for the music "industry" does not grow.

In this context, we also agree with the statement in the consultation document that "*release windows that are too long can hinder the emergence of attractive legal offers and stifle innovation*" and would add that, here again, consumers see people elsewhere in the world having access to something that is unavailable to them. Rightly or wrongly, such situations create a further justification for illicit access to content. However, it should be recognised and applauded that the film industry has identified this problem and is addressing it in a meaningful way.

Imposing a levy on ISPs for unauthorised downloading would be a case study in self-defeating policy. Consumers using legal products would be illegitimately penalised, "all-you-can-eat" services would be destroyed because consumers would feel that they were already paying for downloads via the levy and treating all consumers as if they are involved in illicit behaviour can only possibly serve to further undermine the legitimacy of copyright law.

Finally, we urge the European Commission to push for the narrowest possible interpretation of the exception provided for in Recital 95 the Services Directive (123/2006/ec). This should help ensure that all creative industries, when they put an offer online will make that offer available and accessible to all citizens of the EU at the same prices and under the same conditions. This is an easily achievable but powerful measure to help minimise illicit use of copyright-protected material.

Punitive measures

It is difficult to assess the balance between cause and effect as regards the lack of a single market and illicit downloading, particularly as the balance has changed over time. Certainly, in the early days of the Internet, the lack of any kind of market facilitated the widespread growth of illicit downloading. This was made worse by bad strategic decisions (the history of Napster being a very good example of this, where short-sighted policy-making after its purchase by Bertelsmann caused one service under industry control being closed down, leading to its inevitable replacement by hundreds of similar services, free of all control) of the content industry.

We are now at a crucial juncture, however, where we are faced with a stark choice. We can attempt severe and long-lasting restrictions on citizens' rights through criminal sanctions and increased surveillance as a result of ISP liability. If we do this we tacitly support, reward and encourage the lack of innovation by the content industries that created the problem in the first place. Alternatively, we put all possible efforts into creating a true, vibrant and innovative online cultural marketplace in which European culture will thrive and remove all excuses for illicit activity. We therefore fully support the statement in the reflection document which suggests that the latter is the only viable option:

> *"the internet by definition allows access to content and services irrespective of geographic location, and since global competition for attractive creative content is fierce, responses to most of these challenges will have to be joint European ones, instead of being the result of separate or even contradictory national initiatives".*

It is also important to point out the dangers of unintended consequences with regard to over-enthusiastic attempts to push obligations and/or liability onto Internet access providers (IAPs). The more liability that is placed on IAPs, the more control that they will need to have over consumer access to content. It is a small step for IAPs between limiting access to specific content for policing purposes and limiting access to content

2 http://www.telegraph.co.uk/culture/music/music-news/6677907/Police-spend-800000-a-year-on-music-rights.html

for competitive business purposes. A non-neutral internet poses as many dangers to European cultural competitiveness as the current fragmented market, if not more.

Licence information

There is an interesting dichotomy between how solutions which place obligations on consumers appear – at least on a national level – to know no bounds, while the possibility of imposing solutions requiring action by the content industry are much more limited. We have seen in France an attempt to overturn centuries of human rights law to abandon the principle of an accused person being innocent until proven guilty. Similarly, we see an almost identical plan in the UK, coupled with IAP liability provisions that has already lead one provider to plan deep packet inspection of, on a test basis, 40% of its consumers. On the other hand, the Commission seems to dismiss out of hand the idea that a convention, dating from the century before last, could possibly be updated in order to make ownership and licence information freely available – thereby improving the legal situation for all stakeholders.

Indeed, the inventor of the world wide web, Tim Berners-Lee, promotes the concept of micropayments as the best way of ensuring that easy payment options exist for consumers to pay for online content. Embedded and interoperable payment details (and, potentially, details with regard to reproduction rights, obligations, conditions, permissions, etc) would hugely facilitate remuneration for artists and would benefit consumers and artists alike – albeit to the potential detriment of collecting societies. Should these options not be explored because a convention originally signed in 1886 is not, unsurprisingly, adaptable to the demands of 21st century technology?

The fault will not lie with consumers if legislators and industry wish to try to stop – or rewind – the clock, thereby helping to propagate the culture of non-respect of copyright legislation.

Exceptions and limitations

It is difficult to imagine how the exceptions regime introduced under the Copyright in the Information Society Directive could contribute less to harmonisation of the single market. Apart from the hard-won exception on technical, transient copies, not alone are all other exceptions optional (creating unlimited scope for barriers to the single market), they are also exhaustive, robbing member states of the ability to deal flexibly with the challenges of copyright in the fast-moving information society. In a web 2.0 world, with its huge capacity for new technological developments and trends to facilitate user-generated content, we cannot expect European citizens to wait patiently until the EU decides that they should have the same cultural rights as citizens of other regions of the world. This leads, unsurprisingly, to illicit use of copyrighted material, propagating still further the concept of illegitimate copyright law. Another important impact of web 2.0 is that the world is no longer neatly divided between “copyright holders” and “consumers”. Consumers are increasingly becoming creators (of derivative works in most cases) and in the digital world they should therefore not be considered as a pure consumer, but a user with rights on the content made available.

We also cannot expect the world to wait until the day that the EU is finally able to adapt its exceptions and limitations regime to the modern world. As a result, innovators in other parts of the world (and European innovators with no option other than to move to other parts of the world) will continue to develop exceptions-based services and generate wealth abroad and consumers abroad will continue to be able to benefit from new services. All the while, European business will have its innovation potential restricted and European citizens will not be able to avail of new services.

A perfect example of this is online video recording, where consumers record TV online rather than on a video recorder, DVD or local hard disk. This offers benefits to the consumer (ease of use – it is easier to use a keyboard than a remote control for programming, the consumer does not need to be in front of their TV to

programme the recording, etc) and to the provider (cable providers have to invest heavily in hard disk recorders for consumers, which are a waste of financial and natural resources if their functionality can be duplicated online) while being identical, practically speaking, to traditional video recording and, as a result, have no negative impact on the rightsholders whose works are being recorded.

European citizens are blocked from using such services, however, as private copying (that they have done for generations) is not the subject of a mandatory exception and each country deals with the issue differently. French provider Wizzgo was fined half a million euro for providing such a service, for example. Consumers in the United States, by contrast, already benefit from such services as the flexible "fair use" doctrine was able to adapt easily to this innovation, immediately providing a huge single market for this and similar innovations. Rightsholders speak about "educating" consumers. However, before educating them positively, it is important to stop reinforcing prejudices about unjustified restrictions on access to content.

Extended collective licensing

The reflection document makes a reasonable case for extended collective licensing *with regard to existing content which is not yet in digital form*. For content that is being produced/digitised now and in the future, it would clearly be preferable and more profitable for the real artists to imbed copyright information in their digital content, so that they can maximise profits from their works, rather than having to pay intermediaries, such as collecting societies. Ensuring efficient and adequate payment to artists must be seen as a higher priority than protecting the concept of "no formalities" which was developed for an entirely different context and, indeed, in a different age.

Efforts must be undertaken to achieve a "one-stop shop" wherever possible, with licensing information easily and clearly available to both commercial and private users.

Open Licensing

It is disappointing that Content Online does not explore the issue of open licensing or public domain works.. The EU-funded Communia project (http://www.communia-project.eu/) provides considerable insight into this important issue and the question of open licensing was also raised by the Council Conclusions adopted on 18 December 2009 and entitled "Post I-2010 Strategy – Towards an Open, Green and Competitive Knowledge Economy. In particular, that document invited stakeholders "*to embrace new creative ways of sharing content e.g. by using "Creative Commons" licenses*".

Harmonisation of copyright laws

For the various reasons listed above (formalities, limitations and exceptions, punitive measures, etc) there is certainly scope for harmonisation and simplification of copyright law. However, this process must be planned and implemented carefully, with clearly-defined goals, especially the goal of ensuring that vested interests in the chains of distribution for content do not continue to slow down or stop the availability of content. The lack of availability of content leads to illicit use which, traditionally, has lead to proposals (and measures) to restrict online freedoms. It is in the interests of all stakeholders, from the real artists to content industry intermediaries to citizens that this be done comprehensively and effectively. It must be remembered at all times that, in the absence of a credible and respected legal framework for copyright, the only option is excessive, disproportionate, self-defeating surveillance of consumers' private communications. In this context, we welcome the protections offered to consumers in the 2009 telecommunications package.

Conclusions

EDRi is strongly in favour of measures which increase transparency, support innovation and competition and, above all, which ensure that online content is available in the format and at the price that minimises the temptation for users to avail of unauthorised access to content. We believe that this can best be achieved by:

- prioritising development of legal services;
- prioritising the creation of a single market for online content;
- avoiding the imposition of punitive measures against citizens, which will only serve to further undermine the legitimacy of copyright law while risking further unintended consequences;
- ensuring maximum availability of licensing information, taking the necessary steps to adapt international copyright law, as necessary;
- updating European legislation on exceptions and limitations, in order to protect European culture and allowing European industry the maximum scope for innovation;
- prioritising alternative licensing models such as open licensing;
- adapting European copyright legislation as necessary to achieve these goals;
- ensuring that European copyright, innovation and access to culture are not undermined by vested interests in the outdated distribution chain for cultural content.

European Digital Rights
Rue Montoyer 39/3, B-1000 Brussels
E-Mail: joe.mcnamee@edri.org, http://www.edri.org