



**Comments on Reflection Document of DG INFSO and DG
MARKT on Creative Content in a European Digital Single
Market: Challenges for the Future**

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This response is formulated by the Audiovisual Producers' Rights Management Association (EGEDA).

EGEDA was set up in 1990 to represent and defend the interests of audiovisual producers in Spain and Latin America and manage their copyright and neighbouring rights.

EGEDA would like to thank the European Commission for launching this second public consultation on creative content online. In its answer EGEDA has focused on the aspects related to the audiovisual sector.

1. General Comments

In the introduction of the Reflection Document on Creative Content in a European Digital Single Market ("the Reflection Document") DG INFSO and DG MARKT have recognised the following key issues of importance to the content sector: 1) copyright is the basis for creativity; 2) copyright needs to be protected by European policymakers in an evolving economic and technological environment; 3) creators and right holders need to be remunerated for their creative works and; 4) the EU should have a culturally diverse content market.

For the content sectors it is encouraging that the Reflection Document has made a first attempt to briefly outline the different challenges that each content sector faces in the online environment (such as the music, publishing, audiovisual and video games sectors). However it is a pity that in trying to deal with these challenges both DGs did not make any proposals to enhance the value of creative content or copyright in the EU. They thereby failed to acknowledge that without a constant offer of interesting creative content and strong enforcement of copyright in the online environment a digital single market (or even a substantial market) will be difficult to achieve. Besides given the recent national initiatives to fight online piracy (e.g. Hadopi law in France) the European Commission should examine this matter more closely, in particular as national solutions may diverge and create an obstacle to develop a single European digital market for content.

The EU actions proposed by the Reflection Document for a digital single market of creative content focus mainly on improving the access for commercial users' to online creative content. No concrete actions have been put forward to create a more favourable environment for creators and right holders.

2. Specific Comments on the Audiovisual Sector

The Reflection Document gives a brief overview of the future challenges of the audiovisual sector in the online environment. Unfortunately this overview is incomplete and fails to highlight the areas that are crucial to the audiovisual sector such as the financing of the production of audiovisual content, the online enforcement of copyrights, and the fact that audiovisual content is driven by cultural and linguistic factors.

The Reflection Document does not consider either any means to increase the production, financing or availability of national, cultural and linguistic diverse online

content. It is merely focused on streamlining pan-European and/or multi-territory licensing processes to the benefit of commercial users.

Territorialisation of the European Audiovisual Sector

The Reflection Document states that the audiovisual market in the European Union is territorially partitioned creating difficulties for the multi-territorial distribution of audiovisual content online. Before proposing any initiatives to create a European digital market of audiovisual content, it is important for the European Commission to have a clearer understanding of how the European cultural and linguistic diversities have shaped the audiovisual market in the EU.

Territorialisation is largely caused by the nature of the audiovisual content. In the European Union, audiovisual content and services, unlike the music, are driven by linguistic and cultural factors. Many consumers demand local content linked to their traditions, culture and language. This practice determines the way in which rights are cleared.

European distribution companies mainly exist on a national basis and acquire rights for national markets to cover promotion expenses in their specific market. In short, vertical integration between production, distribution and exhibition at international level is a feature of Hollywood majors that does not characterise the European audiovisual industry. And it has not yet proven as successful for the European production. The European scenario involves separate production companies, sales agents and local distributors who often share part of the risk of producing and promoting audiovisual content. Therefore, rights for online exploitation for a specific work may reside, or being shared by, with different producers, distributors or broadcasters in various territories. To add to this complexity, the rights to different language versions (following Directive 93/83/EEC)¹ may also reside with different distributors throughout Europe or (still) with sales agents/producers.

Notwithstanding this, EGEDA considers that the European audiovisual sector should seize the opportunities offered by the digital environment and develop pan-European online platforms. The European audiovisual sector has an interest in developing a digital market for film in order to have as many competitors as possible. It wants to avoid the situation whereby the digital market is controlled by one or two dominant players. Besides a digital market will help European companies to distribute their audiovisual works internationally and provide a new exploitation window, and added income, to European films.

Being aware of this opportunity, EGEDA, with the support of Spanish producers, set up in 2006 Filmotech², its legal online platform of audiovisual content. Filmotech is making available 1.600 digitized films and has concluded 300 contracts with producers in order to distribute their contents through the platform. The usual price for the viewing of a film by the consumer is € 1, 39 (VAT included); nevertheless, each producer or rights holder has the possibility to determine the prize of each of its

¹ Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 06.10.1993, p. 15-21.

² www.filmotech.com

individual features. Users have thus a wide choice of audiovisual content in exchange of a reasonable price.

Release Windows for Video-on-Demand (VoD)

The Reflection Document states that the current system of statutory and contractual provisions relating to release windows “*can act as a barrier to the availability of content on digital platforms across borders because of the time lapse between VOD and other releases.*”³

An understanding of how the audiovisual works are financed (the business model) in the EU is crucial to have a better knowledge of when, how, and where audiovisual content is distributed to the consumer. The European cinema industry, as well as other third countries cinema industries, receives a relevant support from state aids. In many Member States these aids require the respect of release windows (theatres, DVD, TV and VoD), whose aim is to avoid that European films be excluded of certain circuits (mainly the theatres and dvd) due to the pressure, and economic size, of other operators in the same markets. Also in many countries broadcasters have the legal obligation to invest a part of their income or revenues in European national productions (as foreseen in Directive 97/36/EC)⁴, and receive the exploitation rights for VoD of co-produced films. In addition to this, state aids are directed towards both new productions and traditional distribution schemes, and do not enable European film producers and rights holders to take risks in the digitisation and online dissemination (promotion included) of their works.

Nevertheless, national and EU funds remain vital for the roll-out of pan-European online platforms. Both national governments and EU institutions should foster the set up of pan-European online platforms to render the European film sector more competitive and sustainable, as well as available to consumers throughout the EU. The MEDIA programme, for instance, is very helpful for the film sector in terms of production, co-production, distribution and training. It also helps developing online platforms but at national level or in 2 or 3 Member States and not covering the whole EU. EGEDA has applied several times to the MEDIA programme to put in place a pan-European platform. The European audiovisual sector is thus interested in shifting to pan-European online business models. However the sector needs the financial support from EU institutions and national governments to succeed. The private sector (most SMEs) cannot afford to raise the financial investment required to operate at pan-

³ Creative Content in a European Digital Single Market: Challenges for the Future - A Reflection Document of DG INFSO and DG MARKT, 22 October 2009, p. 8.

⁴ Recital 45 Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202, 30.07.1997, p. 60-70.

“Whereas the objective of supporting audiovisual production in Europe can be pursued within the Member States in the framework of the organization of their broadcasting services, inter alia, through the definition of a public interest mission for certain broadcasting organizations, including the obligation to contribute substantially to investment in European production.”

European level. The lack of financial support may drive the online market to duplicate the situation of the theatrical and dvd markets, in which the overactivity (market occupation) of certain operators prevents European films to access to the market in similar conditions and receive equal treatment (Fox's Avatar has been released in Spain with over 800 prints, equivalent to near 25% of the available screens).

The Reflection Document has acknowledged that online platforms do not generally contribute to financing the production of films and other audiovisual works as the "traditional" distributors. The European Commission is looking at ways to improve the access for consumers and commercial users to VoD services, but puts forward no ideas or solutions to finance the production of the creative content for VoD services. The Reflection Document does not explain either how the digital economy will pay for the investments in audiovisual content if the traditional investors (distributors and broadcasters) lose the exclusivity of their release windows. VoD services without attractive content are not viable business models.

Consumer demand for access to the same content on different platforms or across borders

Rights holders as well as users are both interested in the creation of a single European market for digital content where rights holders can recoup their investments and be remunerated for their work, as in the physical world, and users can get access to cultural content in the EU.

EGEDA is aware of the fact that the deployment of pan-European online platforms is essential for rights holders to remain competitive in the market and for consumers to enjoy culture throughout Europe. This is the reason why it has launched its legal online platform, Filmotech.

Due to the efficiency and circulation speed of illegal networks, legal platforms have to provide added value services characterised by the size and content of their catalogue, their ease-of-use as well as the final image quality. In these circumstances, combined with legal measures discouraging the illegal circulation and consumption, consumers may be more inclined to pay for content. Whereas rights holders are ready and determined to provide such services, they feel that a suitable legal and financial framework should be put in place; in particular taking into account the specificities of the European audiovisual sector (see pages 3 and 4).

It would be very useful that the European Commission further investigates the real demand from citizens in terms of access to audiovisual content throughout Europe. It is relevant to know if there are differences between, for example, sports events and other audiovisual content such as television programmes and films. Often stakeholders have overestimated the demand side for local content from other EU Member States.

Enforcement of Intellectual Property Rights

The enforcement of intellectual property rights (IPRs) has not been tackled in the Reflection Document whereas it is one of the cornerstones to create a single European digital market for content. If the European Commission seeks to enhance pan-

European online platforms, it should help also rights holders to enforce their rights online.

The Reflection Document is not in line with recent initiatives of the European Commission (DG MARKT) in the field such as the 2009 Communication on Enhancing IPRs in the Internal Market⁵, the European Observatory on Counterfeiting and Piracy or the dialogues set up with relevant stakeholders on illegal downloading.

The Document merely states that the availability of legal offers is an important part of the response to widespread illegal downloads. The European Commission thereby ignores that a wide range of legal offers are available today and that users still continue to download and/or accessing (via streaming) to illegal content without being sanctioned for copyright infringement. For instance, EGEDA has set up Filmotech, its legal online platform of audiovisual content, which has to compete with a full array of illegal, and free, supply of films and tv productions, and with transaction (micropayments) costs applied by telecom operators which exceed the 45% of the final price (V.A.T. not included). The European Commission should also look into this matter.

Internet Service Providers (ISPs) play an essential role in the field of IPRs enforcement, in particular in the digital environment. ISPs are making creative content available to their users and obtaining revenues from advertising (mainly), but are often not willing to assist rights holders in tracing infringers. Furthermore, EU legislation permits ISPs to run a business based on illegal downloads of IP protected materials, without any clear obligation to stop it. EGEDA suggests the European Commission to reflect on a reform of the liability system enshrined in the E-commerce Directive 2000/31/EC (articles 12 and 14 in particular).⁶ Furthermore, the fact that the Directive does not impose any obligation to the Member States in the point of identification of non criminal infringers (infractions which are not only related to copyright protected materials, but also to other areas, such as privacy, image and the like) prevents offended parties to obtain an effective court protection of their rights, a fundamental right in the Charter.

In any case, the actual system of identification, where available, imposes a great deal of burden on the stakeholders, while ISPs are alleviated of almost any obligation, even though they know that their services are used to a wide extent for the copyright related infringements, which are easily traceable.

Discussions on this matter have started in several Member States. France is leading the movement with its Creation and Internet law whereby ISPs are forced to collaborate on providing infringers details to the competent administrative agency, Hadopi (*Haute Autorité pour la diffusion des oeuvres et la protection des droits sur Internet*). According to the French law, Hadopi will issue 3 warnings maximum by e-mail and post ('three strikes regime') to users suspected of infringing copyright. The court will

⁵ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on enhancing the enforcement of intellectual property rights in the internal market, COM(2009) 467, 11.9.2009.

⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, p. 1-16.

consider the case separately and will impose a fine, Internet disconnection or 2 years imprisonment.

Under the UK model the British regulatory body (Ofcom) would request ISPs to send warnings to repeat infringers and collect anonymised information on serious repeat infringers. Ofcom would also have the power to ask ISPs to impose on repeat infringers technical measures. But unlike the new French provisions, for the moment in the UK the suspension of Internet accounts is considered to be applied only as a last resort solution.

Spain has recently drafted legislation (the so-called law on sustainable economy), currently under discussion, whereby a system similar to the French ‘three strikes regime’ would apply to websites offering protected content illegally. The Spanish government is not in favour of holding users responsible for illegal downloading practices. Peer-to-peer websites would fall thus outside the scope of the draft law on sustainable economy.

EGEDA is in favour of the French approach. But it has welcomed as well the Spanish approach as it may be the first move towards a national strategy to fight online piracy. Until now the Spanish government had not included at all piracy in its legislative programme. Nevertheless, the above-mentioned initiatives show that national solutions in the field can differ and this may hinder the development of a single European digital market for content. EGEDA calls thus on the European Commission to examine more closely the matter of online piracy in order to develop a single European digital market for content.

3. Comments on Possible EU Actions For a Digital Single Market of Creative Content

Consumer Access: Orphan Works and Extended Collective Licensing

EGEDA welcomes the European Commission’s initiative Europeana for the digitisation and dissemination of cultural content and acknowledges the Commission’s efforts to come up with mechanisms to facilitate the exploitation of orphan works.

EGEDA has closely followed the work carried out by working groups in the area of orphan works within the framework of the European Commission’s 2006 Recommendation on digitisation, online accessibility and online preservation.⁷ We believe that both the Memorandum of Understanding⁸ and sector-specific reports prepared by these groups in 2008 could be a good starting point to propose solutions enabling the exploitation of orphan works. Unfortunately, no follow up has been made of both documents at national level.

The Reflection Document points out that “*the Commission will carry out an impact assessment on possible EU-wide solutions to facilitate the digitisation and dissemination of orphan works.*”⁹ It seems that the European Commission is interested

⁷ Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation, OJ L 236, 31.8.2006, p. 28-30.

⁸ Memorandum of Understanding on Diligent Search Guidelines for Orphan Works, June 2008.

⁹ *Op. cit.*, Creative Content Online Reflection Document, p. 7.

in putting forward an EU solution for orphan works. In this respect, EGEDA recognises the impact assessment under preparation by the European Commission. We deem important to elaborate a first assessment of orphan works, and suggest also the European Commission to look at the impact of orphan works in each content sector (audiovisual, music, publishing and visual) and study the necessity to adopt measures in the field at EU level.

The Reflection Document tackles orphan works from the publishing sector's perspective as an issue very specific to this sector only. However when the Reflection Document alludes to the digitisation of works within the framework of Europeana it includes all types of works regardless whether they pertain to the audiovisual, music or visual sectors. We suggest that the specificities of each sector be taken into account when dealing with orphan works. The problem may not be the same for all sectors, nor is the possible solution. In some cases the work is not orphaned. It is rather a question of proper crediting of the work. This practice happens often in the audiovisual and visual sectors. In other occasions, there may be a lack of diligence in locating the authors and/or right holders.

If the European Commission decides finally to deal with orphan works at EU level, EGEDA advocates the negotiation of licences between rights holders and cultural institutions. In this context collective management organisations can play a very active and important role as they hold registries with information on rights holders and their works. It is the case of EGEDA whose registry has been recognized as reliable by the Spanish Institute for Cinematography and Audiovisual Arts (ICAA) of the Ministry of Culture. These organisations can also grant licences on behalf of rights holders.

Access to orphan works needs to be enhanced but fair compensation needs to be paid to the right holders of orphan works. If the right holder does not turn up after a certain period of time, the collected money could be used to finance for instance cultural projects.

A solution advanced in the Reflection Document to exploit orphan works in the EU is the application of extended collective licences. On the one hand, these licences facilitate the use of works and reduce transaction costs for consumers, and on the other hand they compensate rights holders for the exploitation of their works that could otherwise be used illegally.

This system works very well in the Nordic countries where each category of rights holder is represented by one collective management organisation. The question is whether an extended collective licensing system could be feasible at EU level. From our point of view given the different functioning of collective management organisations in the other EU Member States, in particular in the audiovisual sector, it would be quite difficult to implement this system. Indeed, the audiovisual sector (in contrast with the music sector) usually acts on an individual licensing basis because the producer concentrates all rights (from authors as well as performers by virtue of rights transfer presumptions). Extended collective licences could thus be hard to apply in EU Member States where there are no collective management organisations representing rights holders of the audiovisual sector.

In any case, EGEDA advocates an EU soft approach for orphan works to avoid the European Commission cut across national solutions in the area.

Consumer Access: Exceptions and Limitations of Copyright

EGEDA is not in favour of harmonised European exceptions and limitations for copyright given the specificities of national uses and practices.

Contractual licensing remains the preferred way to implement exceptions and remunerate right holders.

Commercial Users' Access: Creation of a Streamlined Pan-European and/or Multi-territory Licensing Process

EGEDA believes that collective licensing represents a convenient way to ensure online distribution of audiovisual content for European small and medium sized companies. The basic principle underpinning collective licensing, the one-stop-shop scheme, is a guarantee for users to have access to a large catalogue of works without spending time and resources identifying individual right holders. A full network of reciprocal agreements ensuring clearance for the exploitation of protected works in every EU country is essential for the good functioning of VOD platforms. The advantage is that every EU territory will be covered, as far as it ensures revenue flows back to right holders.

Collective licensing lowers thus transaction costs and increases the economic value of rights trading. Moreover, acting collectively individual producers are in a better negotiating position as they represent an interesting catalogue for online services. Collective licensing is especially suited to the structure of the European audiovisual market which is composed of a great number of small and medium sized companies which are not integrated into vertical structure. Finally collective licensing does not imply giving up on commercial freedom - under the model developed by EGEDA, the producer remains free to decide about the works available, the price, the timing and the territory of release -.

Licensing should not constitute a bottleneck to technology and new service developments - therefore the mechanism of negotiation and licence delivery should be simple and fast.

EGEDA requests the European Commission to take into account the structure and funding of the European audiovisual sector before imposing multi-territory licences to rights holders. EGEDA is interested in continue developing its online business model (see page 3) and seize the opportunities it offers. But a legal and financial framework is necessary to enable the European audiovisual sector to make the most of the digital shift and to become sustainable.

The need of a central database or repository containing information on rights and their owners for audiovisual works should be examined further as the observations made in the Reflection Document are applicable to the music sector. The licensing of audiovisual works throughout the EU requires different solutions from the music sector, as collective management plays a different role here.

Commercial Users' Access: A European Copyright Law

The Reflection Document emphasises that the problem of territorial licences lies more on commercial decisions of rights holders and contractual practices than in the existing legal framework. Why then changing copyright legislation? It should be noted that such decisions and contractual practices are not arbitrarily applied by the European audiovisual industry but are a consequence of the way the industry is financed.

According to the Reflection Document the legal basis to create a European copyright title could be the new article 118(1) of the Lisbon treaty.¹⁰ However we understand that this article was meant to deal with industrial property rights rather than copyright.

Besides, significant aspects of copyright law remain a matter of national competence. EGEDA considers thus that it is not possible to introduce a harmonised European copyright law.

Commercial Users' Access: Alternative Forms for Remuneration

The content sectors are not asking the European Commission to develop alternative forms for remuneration of their rights. The online market for audiovisual contents needs to receive first and foremost EU legislative initiatives to fight online piracy and obtain full cooperation from ISPs.

Protection of Rights Holders: Financial Incentives

The MEDIA programme of the EU and national funding programmes for the audiovisual sector should promote the cross border trade of European audiovisual content and assure that industry stakeholders such as ISPs, digital distribution services and end-users reward the investments into culture and content creation.

Protection of Rights Holders: Collaboration with ISPs

The collaboration with ISPs should focus on the online enforcement of IPRs (see page 6). New business models will emerge if ISPs recognise the need to protect and enhance the value of creative content on its networks.

¹⁰ "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements. The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament."