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

FINNMEDIA (The Federation of the Finnish Media Industry / Viestinnän Keskusliitto VKL) expresses its thanks for the opportunity to make a submission to the Ministry on the European Commission Reflection Document “Creative Content in a European Digital Single Market: Challenges for the Future” (DG INFSO & DG MARKT 22.10.2009). Having noted the arguments presented in the document, the Federation respectfully presents the following:

Main messages

1. When developing the copyright system, it will be of first-rate importance to ensure that companies producing creative content enjoy good economic prerequisites for successful operation.
2. Copyright regulations as they now are form a functioning totality in which international conventions, harmonised rules under EU legislation and national copyright laws have their own different roles in balancing the interests of the various rightholders. More detailed harmonisation on the European level does not seem necessary at this stage.
3. Even at a time of rapid evolution of digital technology, content creation has to be profitable and it must be possible to rely on copyright protection when planning new forms of operation. This presupposes that opportunities to invest in creative content are not limited in the future through new limitations of copyright.
4. The key to achieving a Digital Single Market lies in making it easier to agree on rights. It is not differences between national copyright laws that are the most central obstacle to mobility of contents in Europe, but rather the underdeveloped character of cross-border contract mechanisms. The Commission must in its media policy strive to the extent possible to promote the development and adoption of new instruments that facilitate contracts.

5. It must be feasible to implement management of rights as efficiently as possible and without unnecessary intermediaries. There is no need in the present situation to increase the powers of rights management organisations.

General remarks on the Reflection Document and the challenges facing a Single Market for creative content

The Commission's Reflection Document on the challenges facing a Single Market for creative content (DG INFSO & DG MARKT 22.10.2009) contains a comprehensive and well-rounded description of the position of the various rightholders in the ongoing rapid evolution of media. Indeed, the diversity of views that the document illustrates allows it to be used to pursue many different objectives. Although the focus of the document is in principle on musical works and films, an effort is made in it to deal with copyright as a general right that applies to all categories of works. In fact, the document's abstraction level means that little attention is devoted to the different statuses that the various categories of works have in copyright system.

A clear endeavour that becomes evident in the document is the European Union's role as a legislator and a possible need to harmonise Europe's national copyright systems in order to increase the efficiency with which the Single Market functions (especially pages 18 and 19 in the document).

Already as they are at present, copyright regulations form a system that is internationally harmonised to an advanced degree. The contents of copyright are regulated by both international conventions and European Union law. The national room for manoeuvre left after the national and supranational regulation level corresponds well in its present form to the needs that are taken more purposefully into account in national copyright policy. Looked at from the perspective of European Union law, this means that subsidiarity is being implemented well in the present copyright system.

There would not appear at the moment to be a need for more detailed harmonisation of copyright regulations. International and European regulations form a framework that makes it possible to exploit rights everywhere within the territory of the European Union provided success is achieved in making the requisite agreements. The functioning of the Single Market for creative content is being hampered more by the inflexibility of cross-border licensing mechanisms than by material differences between copyright regulations in the various countries.

Operational environment for companies that produce creative content

The point of departure in copyright regulation should be, besides striking a balance between protection of the author's exclusive right and the rights of the party who uses the work, also safeguarding the prerequisites for successful economic activities on the part of companies that produce creative content and invest in its production. It will not

be possible to speak of a Digital Single Market for creative content until marketing of contents is profitable and the threshold to entry into the market is low for new actors. This presupposes that obtaining rights is easy and flexible, licensing across internal borders sufficiently simple and the contents of rights protection in each country as clear as possible.

The competitiveness of companies that produce creative content is the key to not only efficient exploitation of rights and opening up the Digital Single Market, but also to an enrichment of cultural interaction between the Member States of the European Union and increased plurality on the part of the media services that are offered to Europeans. What is involved is, besides providing incentives for creative work, also the European public's freedom of expression. In addition to its important contribution to employment, publishing also has a key role in the development of national languages and cultures.

New limitations of copyright are unnecessary

The conditions in which companies that produce creative content operate and their possibilities to invest in this production depend to a substantial degree on the level of copyright protection and the continuity of legal protection in all technical distribution channels for works. The existing regulations that copyright law contains with respect to the private use of works, lending rights, teaching, archiving and research use as well as mediating them to special groups who are handicapped with respect to their communicative ability constitute a significant narrowing of the exclusive rights that belong to the author. A deepening of the system of exceptions and limitations, which is hinted at on page 15 of the Reflection Document, would be conducive to undermining legal certainty with respect to copyright protection and thereby reducing the profitability of the investments that are made in creative content.

Limitations of copyright have become further accentuated with digitisation of media. Because unauthorised mediation of works has become ever easier technically and increasingly less expensive, also limitations of copyright can more and more often be exploited for purposes that were not the objective when the limitations were set. Copying of material lent by libraries and its distribution through Internet community services is one good example of this. New limitations of copyright would in a corresponding manner tend to increase uncertainty about the profitability of investments in creative content.

The fact that unauthorised use is easy in the online environment is not a ground for new limitations of copyright. Public institutions such as libraries and research establishments are important procurers of copyright-protected materials that must obtain them in the online environment at market prices and on the same principles as in more traditional forms of media. The continuity of creative content production would be seriously jeopardised if public institutions could circumvent copyright production in a digital environment.

Facilitating agreements on rights and licensing

The most central of the present obstacles to marketing creative contents in Europe is the difficulty of concluding contracts. Indeed, the Commission should strive in its media policy to promote, to the extent that possibilities permit, the development and adoption of new instruments that facilitate contractual agreements. The “digital copyright” and aggregating rights into purposeful licence packages that are mooted on page 16 of the Reflection Document could be worthy of consideration in some situations, such as in the sector of music. An attempt could perhaps be made to facilitate trade in creative contents across internal borders through more efficient processing of rights-related information, for example by building pan-European computer databases and developing or promoting the adoption of existing electronic licensing instruments (such as the Automated Content Access Protocol ACAP).

There is an acute need for systems to facilitate direct licensing. At the moment, content-protected material is being illicitly exploited on an extensive scale on the Internet with the aid of search engines and content aggregators. Safeguarding publishers’ right to prohibit this in the online environment is a prerequisite not only for profitable investments in creative content, but also for a publisher being able to comply with the legislation relating to creative contents.

One of the most important dimensions of concluding contracts is the transfer to the employer of copyright on works created within an employment relationship; this transfer should be facilitated and clarified by means of either national law or union regulations. The operational obligations on companies that offer employment opportunities to authors should be simplified with respect to both acquisition of rights and their licensing.

Rights management without unnecessary intermediaries

Collective rights management organisations have proved to be a sensible way of managing rights in mass utilisation based on traditional analogue technology as well as in the sector of music. However, digitisation of media has opened up new opportunities for companies to develop direct licensing as a part of new product and service concepts. For this reason, the possible strengthening of the role of the organisations that is alluded to on page 20 of the Reflection Document would tend to foster a superfluous intermediate layer in the market mechanism and add to the costs of concluding contracts on rights. A new collective management would also complicate the copyright system and thereby make it more difficult to buy and offer contents.

In those modes of utilising works in which the rights management organisations’ collective licensing will be needed also in the future, it is absolutely important to ensure that accounts are equitable and transparent, as is mentioned in the Reflection Document (page 20). However, conceiving of copyright more broadly as a compensation right in which collective management would be a key starting point is strongly in conflict with the competition-based business activity of creative content production.

Copyright is, among other things, the right to prohibit competitors from using creative contents in which the company has invested as part of its business operations. This applies just as much in traditional publishing as in digital online publishing. In order for the copyright system to encourage competition in the sector, opportunities to promote licensing of rights direct and without the collective management that dilutes opportunities to compete should be promoted. Direct licensing would safeguard the vitality of European publishing also in the online environment.

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The Federation of the Finnish Media Industry / Viestinnän Keskusliitto VKL

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FINNMEDIA (the Federation of the Finnish Media Industry / Viestinnän Keskusliitto VKL) is an umbrella organisation for the media sector and printing industry. Its task is to promote the conditions essential for the effective operation of the sector with the aim of ensuring a diverse range of mass media services for the Finns. The Federation represents about 800 companies with some 25 000 employees. The companies represented have an approximately 80% share of the mass media market in Finland. The Federation's members are the Finnish Periodical Publishers' Association, the Federation of the Printing Industry in Finland, the Finnish Newspapers Association, the Finnish Book Publishers' Association, the Association of Finnish Broadcasters, and the Association of Finnish Television Broadcasters.

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