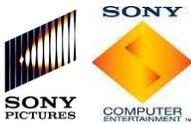




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# CMBA

CreativeMediaBusinessAlliance

Brussels, 4th January 2010

## CMBA comments on a Reflection Paper on "Creative Content in a European Digital Single Market: Challenges for the Future"

The Creative and Media Business Alliance (CMBA) is an informal grouping gathering some of Europe's top media and creative business and industry associations. It was launched in November 2004 to give the sector a strong and united voice at the level of the European Union. The sectors represented by the CMBA are more than a mere driver for technology development or an "added value" to the EU Digital Agenda for European competitiveness. They are the true value of the Information Society.

### Introduction

The creative content industries are key to future economic growth and employment. This is a fast-growing, dynamic sector, one of the most successful globally, providing millions of jobs and bringing important benefits to the EU economy. As recognised by the European Commission, the cultural and creative sector "generates a turnover of more than € 650 billion annually and contributes on average 2.6% of EU GDP, while employing more than 3% of the EU work force". Jobs in the creative and media industries sustain local culture, require high levels of skill, and contribute directly to the Knowledge Society. They are jobs that help to shape the future.

**As creative and media industries, we generally support a market-driven approach for the exploitation of our rights and for licensing in particular. Contractual freedom in commercial transactions is thus of paramount importance for our sector. Contrary to what seems to be suggested in the Reflection Paper, copyright it is not merely the right to be remunerated, but it is the right to choose how to conduct your business.**

Our sector is developing a lot of innovative and attractive services online, but in order to develop the legitimate market further, the rule of law must be respected in the online world. **In this respect, the CMBA calls for robust enforcement of IPRs in the online environment. This priority should thus be part of the European Digital Agenda to be developed by the new European Commission.**

The EU should therefore ensure that the appropriate market and legal conditions are not only in place but are also respected equally by all market players in order to allow a proper development of the creative content sectors without obstacles.

<http://www.cmba-alliance.eu/>

## Specific comments

### 1. Licensing in the online environment

#### a) Ambiguities and misunderstandings

The Reflection Paper contains a number of ambiguous or unclear passages, which seems to be the inevitable consequence of attempting to tackle copyright-related issues for a number of superficially similar but far from identical creative sectors. For example: our experience is that entirely different issues arise, notably in connection to pan-European or multi-territory licensing, as between those rights which are collectively managed (where the existence of a “one-stop shop” allows access to the global repertoire of music rights) and those rights which are not subject to collective management and therefore are traded individually. Although they may both be caught by a general term such as “licensing of content”, rights clearance and rights acquisition are fundamentally different processes, and the moves by content industry to embrace the online world have raised different issues as between the two processes.

At a less technical level, the role of language varies enormously between the different content sectors represented in the CMBA. Language is vital in the printed media – no consumer will buy a book or newspaper in a language they cannot understand. It is extremely important in the film and television sectors, where subtitling and dubbing can, to an extent and for some genres of television only, mitigate the issue so that a consumer can enjoy content originally produced in a language they cannot understand. And it is much less important in the music sector, where many consumers regularly listen to music in unfamiliar languages.

We also believe that the Paper underestimates two key points about the content industries. First, the content industries are enthusiastically launching and experimenting with new and innovative business models to allow us to maximise the potential of online distribution. It is hard to see how any attempt to downgrade copyright to a mere “right of remuneration” would in any way encourage these efforts. Besides, the Reflection paper ignores the fact that the single greatest challenge to the sustainability and viability of these business models is piracy and the unfair competition that illegal services represent to legitimate services which engage in legitimate licensing and regulatory compliance. Unfortunately, the Reflection Document does not propose solutions to this fundamental challenge.

Secondly, the Reflection Paper tends to speak of “content” as a whole. Yet the issues and challenges posed by the online world differ greatly across the CMBA membership, which is a diverse grouping in terms of our business models, revenue sources and regulation. To give but one example, orphan works are a key challenge for some CMBA members, for others the issue is of marginal relevance at best. Consumers also use “content” in different ways – compare the number of times an average consumer will listen to a song they enjoy to the number of times they will re-read or re-watch a book or TV show.

**We therefore call on the Commission to arrange for separate analysis to be carried out for the different sectors of the so-called “content industry”.** The complexities and differences among our sectors are underestimated by those who ignore the contribution of

professional content – whether music, film, television or writing – in driving the digital economy, often, bizarrely, regarding content as a barrier rather than a springboard to successful new services. The European Commission should not make the same mistake.

## b) Commercial freedom

The creative and media industries are offering a wealth of legal services and quality content online (music, books, films, TV content, newspapers and magazines) which require significant financial investment, creative risk and long-term planning. Europe's digital competitiveness depends on the existence of an online level playing field where commercial freedom is guaranteed, which allows parties to enter into commercial negotiations with a view to defining the most appropriate arrangement in each individual case.

**Digital distribution is part of the e-Commerce business world and will remain so. From a market perspective, it is necessary to have the freedom to choose when and how to make copyrighted works available to address specific needs and cultural differences of each local market. Digital technologies provide new and innovative ways to customize and enrich the offer for each market and meet consumers' demand. If our companies are to achieve their full potential in these new technologies, commercial freedom must be preserved.**

## c) Community-wide/Multi-territory licensing

The Reflection Paper mentions the possibility to create a streamlined pan-European and/or multi-territory licensing process. **CMBA members are already engaged in developing pan-European licenses when there is a demand from the market and when it makes sense commercially. Pan-European/multi-territory licensing should be voluntary and market-driven.**

In addition, licensing models are necessarily different depending on the type of content which is being distributed. The industries that the CMBA represents encompass a wide range of content creation and distribution models which have their own characteristics and therefore different needs. In addition to the language issue, different content sectors have different traditions of management of rights and different modes of consumptions. One uniform licensing model will not fit all content industries and is bound to stifle innovation.

The CMBA submits that there cannot be any single response to which creative media businesses should support what particular model. The answer to this question will – and should – vary from one instance of commercial negotiation to another. The current diversity of “licensing models” in the online marketplace is what drives the launch of new services and new business models. As new and various business models are being tested and embraced by the creative industries, it is clear to the CMBA that no one business model could be effective at meeting the diverse needs of European creators, different content sectors and consumers. Hence, what needs to be encouraged is a voluntary flexible mechanism based on contractual freedom, not a one-size-fits-all solution.

As far as the music industry is concerned, it is providing pan-European licenses, either directly by record companies for download services, or via collecting societies on the basis of the IFPI agreements for Simulcasting and Webcasting.

The AV sector is also serving the European market with due consideration for local demand, sensitivities and cultural diversity (cultural preferences, classification regulations, language, etc.).

In the publishing sector, books are generally licensed on a world-wide basis for a given language. Yet sometimes because of a number of concerns which are unrelated to copyright such as defamation laws, some online retailers might refrain from selling to other EU Member States.

Although newspapers remain mainly a national/local market, publishers are also working towards offers and services which could meet international/European demands (even if this market remains marginal). PDLN - Press Database Licensing Network – has been created to improve coordination between publishers and their respective press licensing systems and better respond to users' demands.

The creative sectors are engaged in putting in place pan-European licenses in order to develop the availability of online content across Europe. However, it should be borne in mind other constraints may also have an impact on the development of cross-border online services such as laws governing youth protection, data privacy and consumer protection, as well as differing tax regimes.

#### d) Extended collective licensing/collective management of rights

The Reflection Papers refers to the option to impose extended collective licensing systems as an easy way to create access to creative content for consumers and further explores the idea of extending collective management of rights to the internet (to increase commercial users' access to content). In the CMBA view, economically speaking, such schemes and the extension of any form of mandatory collective management of rights would adversely affect the intrinsic value of copyrighted works, deter future investments in the production of high-value premium content and act as a disincentive to making that content available through a variety of business models.

#### e) Single Community Copyright Title

The Reflection Paper examines the opportunity of adopting a “European Copyright Law” by means of a regulation in order “to create a more coherent licensing framework at European level” and it considers the possibility of using the new Article 118 of the Lisbon Treaty as a legal basis for this future legal instrument. **In the CMBA's view, it is not clear whether the new Treaty confers specific competency to the EU in this regard, especially for copyright, since its Article 118 was drafted for industrial property purposes.** According to the U.K. House of Lords, “*the new Article 118 of the TFEU is a restatement of existing powers. Although the Treaty of Lisbon would not confer additional IP powers on the EU, it marks a statement of political intent and a commitment to achieving the Community patent<sup>iii</sup>.*”

Moreover, if a new regulation were to introduce a “Community copyright title” alongside national titles, it would clearly add a layer of complexity to the rights clearance process in the EU. As to the even more drastic option of simply replacing national titles by a European one, it sounds at best very premature and extremely complex to achieve since this option would require addressing not only issues related to exclusive rights and exceptions but a host of other complicated and potentially divisive issues. Not only it remains unclear how these

issues could be tackled at an EU level but it would fail to provide rapid, pragmatic solutions which can best be reached by pragmatic, dialogued-based discussions such as the ones on orphan works.

f) Specificities of different sectors

**The specificities of different sectors (music, AV/Film, TV, publishing...) have not been fully taken into consideration in the Reflection Paper. Our sectors face different economics and licensing regimes that require different solutions:**

- *Music sector*

The digital music sector has been at the forefront of the Digital Economy and has continued to evolve and improve in 2009. Music companies are experimenting with a variety of business models, broadening their licensing activities to develop cross-border services, enabling new types of deals and investing in product innovation in order to deliver music in the way fans want, wherever and whenever they want it. This is a key challenge in the digital age – how to engage consumers and monetise that activity at every touch-point. In Europe there are now more than 255 unique legal music services offering millions of licensed tracks.

Workable models for pan-European licensing of rights are essential to drive the European on/line and mobile markets for content. The music industry has done its share for providing pan-European licenses, either directly by record companies for download services, or via collecting societies on the basis of the IFPI agreements for Simulcasting and Webcasting. The Commission should encourage the development of multi-territory licensing by authors' collecting societies as well. Indeed, the main problems with licensing of European digital music rights relates to the refusal of the authors' societies to adapt their practices to the new on-line and mobile environment, in particular their unwillingness to offer EU-wide blanket licenses on fair and non-discriminatory terms and to open their services to any form of competition.

- *Book sector*

The book sector is living a revolutionary moment. While paper remains the favourite medium to read from, we are investing massively in new technologies since it is predicted that e-readers will become increasingly mainstream and our readers will (might) be downloading their books as they are now doing with music or AV. What is not likely to change is that in most cases, citizens will prefer to read in their native language, hence the need to encourage translation within Europe. Once a book has been published in one Member State, it can be bought anywhere in the world (with one caveat for books written in English which sometimes are published both in Europe and in the States and then have some territorial rights attached to them, although this does not affect the European market).

Authors and other creators contributing to a book license their rights to a publisher (or an agent) who can then license these rights to a foreign publisher for translation, another publisher for an audio-book or to an AV producer to adapt the book to the cinema. Once the book/audio-book is published then it is sold directly to booksellers (sometime through wholesalers). Libraries, institutional consumers and individual readers can acquire the books. The whole chain functions perfectly well and it does not require collective licensing.

Collective licensing plays a role for secondary uses of works only.

- *AV/film sector:*

Financing AV and cinematographic works is a costly, complex, risky and delicate endeavour and the producer's faculty to license these works in a commercially viable way is hugely important. Without this faculty, the production and exploitation of professional high-quality AV content would be impeded at the expense of all of those in the value chain. Collective management is not a common feature in the AV sector and, as recognised by the Reflection Paper, its use is basically limited to private copying exceptions and cable retransmission rights.

In the AV/film business, decisions to engage in single or multi-territorial licensing are made on the basis of informed decisions aimed at maximizing exposure of the works, on a case-by-case basis, with due consideration for local sensitivities (cultural preferences, consumption patterns, classification regulations, language, etc.), local demand and the requirement to ensure full consumer satisfaction. AV/film producers will always seek to position their works in the best competitive position in order to cover production costs, pay everyone involved, secure return on investment and finance future works.

"Release windows" are also an important characteristic of the audiovisual industry, whereby works are released in different formats in a sequential order (e.g., for a film: theatrical release, DVD/VOD, Pay-TV, free-to-air television). The contractual freedom to set time periods for the release of films in any medium is a fundamental feature of the audiovisual industry's business models both in terms of exploitation and as a strategic tool of upstream financing of production through pre-sales in various formats and in various territories.

European policy has wisely confirmed the importance of this flexibility in Article 3d of the recently adopted "Audiovisual Media Services Directive", which provides that "*Member States shall ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rights holders.*" With the multiplication of distribution channels in the online environment, the need for flexibility in the choice of release patterns for audiovisual works increases even further, with always the same aim of carefully determining the optimal exploitation pattern in any given market.

- *Commercial TV sector:*

The notion of exclusivity remains a vital differentiator for commercial broadcasters in the increasingly competitive market for audiovisual content, which can now be delivered via a number of different platforms. Unless a broadcaster can persuade significant numbers of advertisers or subscribers to choose to view the broadcaster's content offer, rather than that of his competitors, then the revenues are unlikely to cover the rights costs, with negative consequences not just for the broadcasting sector but also for those dependent on investment from broadcasters, notably European film and television producers and sports federations and clubs.

In the broadcasting/audiovisual media service sector, an increasing number of operators are also choosing to distribute across frontiers, either via satellite or online. Given the obvious importance of language in most television content, these services are typically aimed at a clearly-defined target audience (e.g., expatriates) where this can be easily identified and

adequately monetised. Separate contractual negotiations will of course be necessary for any such service, as the core service will usually only have the necessary rights for a specific national territory or language zone. The issues raised in these negotiations will vary from one programme to another, with programme genre and language being key variables.

Typically, sector-specific regulation may also play a role in these negotiations and in shaping the programming strategy of a given broadcaster/media company – notable examples include DG Competition and NCA decisions on rights ownership, European and national investment and broadcasting quotas obligations and restrictions around advertising in certain genres.

- *Press sector:*

Surprisingly, the press sector does not feature in the Reflection Document (beyond its first mention in the opening paragraph) as a creative sector worthy of analysis. It is therefore questionable how the Commission can evaluate the impact of any change of legislation or any new initiative in the field of copyright without due consideration of the impact of any changes on the press directly or indirectly.

At present the press in Europe faces different structural and economic changes and challenges:

- On the one hand, publishers continue to invest heavily in the production and the dissemination of their editorial content on various platforms, whether in print or via the internet or mobile;
- On the other hand, they are facing a decrease in advertising revenues, stronger competition from other players including publicly funded broadcasters and also increasing unauthorised use of their content by third parties such as news aggregators without payment or prior authorisation. Publishers meanwhile are developing new ways to finance online content, in particular through paid for online models and more effective advertising.

In formulating copyright policy, we therefore ask the Commission to avoid prescribing analogue solutions for a digital future not only in terms of rights and exceptions but also recognising the potential of technology to provide innovative ways for publishers to manage their rights. By adapting rights management procedures in particular, as an integral part of the process of offering their content directly and through new internet and mobile services to consumers and other businesses, copyright will continue to underpin business innovation in the content sector.

The production of professional journalism, with the legal risks and liabilities it entails, requires substantial financial, technical and other forms of investment. No business can exist without a means to ensure a return on that investment. As the Reflection Document rightly states, *“Right holders want to ensure that they are remunerated fairly and adequately when their works are used on digital platforms.”*

Without a firm foundation in law and incentive to ensure a fair commercial return new business models created by publishers to meet the demands of business users and consumers will not reach their potential. Whilst the publishing industry would not disappear, quality and diversity of editorialised journalism would undoubtedly suffer as investment

continued to decline and jobs were lost.

All these different conditions need to be taken on board as part of an overall analysis of how to ensure appropriate copyright conditions for a sustainable and healthy press sector.

g) Alternative forms of remuneration/ compulsory licensing

The Reflection Paper mentions the possibility to introduce a form of compensation from ISPs to right holders for the illegal mass reproduction and dissemination of protected works on their networks. However, the CMBA is opposed to such alternative remuneration models for legal, commercial and practical reasons.

- *“Global licence”:*

This system would modify the Copyright legislation to introduce the compulsory collective management of the making available right, and the legalisation of unauthorised downloading under the private copying exception. The CMBA is opposed to this model for the following reasons:

- No economic viability: if a fixed remuneration per subscriber were to compensate all the right holders involved for their investments in the creation, production and distribution of creative content, it would have to be so high that it would multiply the current price of an Internet subscription.
- The compulsory collective management of the making available right is contrary to the exclusive character of this right established by Article 3 of the Directive 2001/29 as it would prevent right holders from exercising and negotiating their exclusive rights themselves.
- The legalisation of downloading is incompatible with the three step test in Article 5.5 of the Directive 2001/29 and in the Berne Convention as it would directly prejudice the legitimate interests of the right holders and the normal exploitation of works.
- The “generalised flat rate” system envisaged by the global license would replace the exclusive rights online and would eliminate the possibility to license them to platforms.
- Finally, the administrative and distribution difficulties of any flat-rate system would be immense.

- *“Creative contribution” model:*

Other suggestions propose to maintain the exclusive right of making available and the commercial licenses based on that right, but to legalise the (illegal) downloading of content and introduce compensation for that downloading. The CMBA is also opposed to this idea for the following reasons:

- Incompatibility with legal offer: under a “creative contribution model”, if users were required to make a monthly payment for the use of (illegal) content, they might become very reluctant to pay in addition for the use of legal services online, thereby undermining the sustainability and viability of legitimate offerings, which is an important goal of the Reflection Document.
- Incompatibility with enforcement of copyright: if a payment is imposed on Internet users to compensate for the illegal use of content, it will make it

- much more difficult for the right holders to enforce their rights and take legal action for the same acts of dissemination, even if these acts are still illegal.
- Finally this model would raise the same administrative issues and distribution problems as a global license model.

## 2. Exceptions and limitations

The Reflection Paper calls for further harmonisation of exceptions and wonders whether some of them should be made mandatory by making a distinction amongst certain exceptions.

The CMBA believes this to be unnecessary and potentially damaging to an environment in which Europe's creative industries will flourish and consider instead that licensing solutions, which are able to take account of exceptions and limitations, are the best and most effective way of achieving this goal.

We believe that a sufficiently balanced and harmonised approach has been achieved with Directive 2001/29 and there is no need to change this at present. Furthermore, the current list of optional exceptions is the result of long negotiations that proved difficult and there is no evidence showing that the result of a new debate to agree to more harmonised and mandatory list would be easier now. Experience has shown that the national implementation of exceptions is intrinsically linked to national and cultural traditions.

The way to improve access is not by reopening existing legislation but by providing incentives to invest in new business models preserving the principle of contractual freedom and promoting trust and collaboration between parties. For example in case of the exception for the benefit of people with a disability, it has been implemented in all Member States but still in many countries disabled people enter into licensing schemes with publishers that allow more flexible uses than those permitted under the exception. Publishers are involved in several projects both at EU and national level to find improved solutions to provide access through trusted third parties or directly with right holders. Promotion of trust is in this case, the best way forward.

The updating of specific exceptions at a national level may well be appropriate and indeed this is already occurring in some individual jurisdictions.

There is also no need to make a distinction between "public interest" exceptions and "consumer" exceptions to achieve targeted harmonisation. This would first of all introduce further confusion to determine which exception falls under which category. Secondly, right holders want to give access to their works as it is in their commercial interest to do so, provided they are rewarded for their efforts, and the goal to increase access by harmonising exceptions further is not the way forward regardless of the type of exception.

## 3. Enforcement

The Reflection Paper gives the impression that the only obstacle to the development of the digital market is the lack of licensing. The paper fails to recognise that the legitimate online market cannot develop without, in parallel, proper enforcement of copyright online and respect for the rule of law. The Reflection Paper disappointingly fails to address this issue.

Violations not only affect the rights held by the creative industries, the most obvious being the violation of intellectual property rights, but every day brings its share of examples of illegal electronic communications (e.g., identity thefts, defamation, tax evasion, disregard for consumer protection rules, cyber-squatting, cyber-mobbing, etc. The list just goes on unfortunately). To make matters worse, these victims (citizens, consumers and legitimate businesses) most often find themselves with little or no remedy to correct the wrongs. This situation only benefits those who use the Internet in an unlawful manner and who expect and depend on the fact that their identities are unlikely to be exposed and that they won't be held accountable. This in turn undermines the trust consumers place in the Internet as a medium for communication and legitimate commerce.

Our businesses continue to develop online digital services across Europe. Yet, they can never flourish while being stunted by the presence of rampant piracy of content. Piracy constrains legal distribution online and has a huge impact on entrepreneurship and investment in new services. Some countries in Europe (e.g., France, UK, Spain) are confronting head-on this threat to their cultural industries and are taking legislative measures to fight piracy.

At the European level, the CMBA recognises the need for coordinated action and calls for a robust enforcement of IPRs. We believe that the EU should come forward, with legislation providing for efficient measures to combat the illegal dissemination of content online and help driving consumers towards legitimate services..

## **Final remarks**

Since copyright has proven to be dynamic by developing and adapting successfully throughout the centuries to keep pace within the introduction of new technologies, we suggest it is preferable to let the market adapt existing solutions for copyright to new technological realities rather than changing the law. Introducing inappropriate and untested measures carries the substantial risk of damaging well-established and innovative creative businesses. In this respect, the European Commission has an important role to play in encouraging stakeholder dialogue.

We appreciate that the European Commission may want to assess regularly whether the right instruments are in place. However, we understand and trust that the Commission will continue its analysis of the issues discussed in the Reflection Paper before proposing any changes in the law.

Finally, CMBA members consider that at present copyright legislation is sufficiently harmonised at EU level. As a priority, efforts should focus on the proper implementation and enforcement of this vital framework if a true commercially viable and diverse digital content market is to develop even further.

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<sup>i</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/551&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>ii</sup> House of Lords: European Union Committee, 10<sup>th</sup> Report of the Session, 2007-08, Volume I: Report: The Treaty of Lisbon: an impact assessment, pp 219-220.