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CreativeMediaBusinessAlliance

Brussels, 13 October 2006

Public Consultation on Content Online in the Single Market Response of the "Creative and Media Business Alliance" (CMBA) to the Questionnaire of the European Commission

I. Executive Summary

The Creative and Media Business Alliance (CMBA – <http://www.cmba-alliance.eu/>) is an informal alliance comprising trade associations and individual companies active in the advertising, broadcasting, film, music and publishing sectors. The CMBA's written response to the European Commission's questionnaire underlines the fact that Europe is the only part of the world that currently has the ability to compete with the United States in providing the kind of creative content needed to foster a healthy "Content Online" marketplace. However, the CMBA also stresses that in order for Europe to remain – and thrive as – a centre for excellence in the creative and media businesses, the European Union urgently needs to rise to the challenge of becoming the world's leading knowledge-based economy, as per its "Lisbon Strategy".

In its specific replies, the CMBA puts forward concrete ideas as to the role that it deems should be played by the European Union to incentivise the development of a healthy environment for "Content Online". The following specific actions are notably called for:

- A strengthening of network users' interests in the context of the review of the EU's "Telecom Package". This by introducing regulatory provisions to ensure that network operators/providers contribute actively and responsibly to a secure "Content Online" environment.
- The establishment of stronger deterrence against IP theft and cyber-criminality in general, notably by facilitating enforcement efforts.
- Continued encouragement for the migration to legitimate content delivery services, through robust inter-industry codes of conduct and/or concrete legislation.
- A light-touch regulatory approach to the e-commerce environment, notably with regard to taxation levels (VAT). Indeed, today the EU VAT regime discriminates against electronic products and impacts negatively on the launch of new creative services online.

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

- More room for self-regulatory arrangements that are often the most efficient way, especially in the online world, to meet public policy objectives.
- A strong support for industry-led standardisation efforts aimed at fostering Platform, DRM and Content Interoperability (for example within the Digital Video Broadcasting Project).
- The further development of awareness-raising initiatives to inform citizens about the value of intangible products and services. People who would never steal in a shop should understand the clear damage caused by online theft.
- Finally, before seeking further harmonisation of single market rules, the Commission needs to focus on better enforcement and implementation of regulations already currently in place.

II. Questions & Answers

Types of creative content and services online

1. Do you offer creative content or services also online? If so, what kind of content or services? Are these content and services substantially different from creative content and services you offer offline (length, format, etc.)?

As an informal alliance comprising trade associations and individual companies active in the advertising, broadcasting, film, music and publishing sector, the CMBA membership represents a wide range of activities, which covers the production and distribution of all the types of creative content and services identified by the European Commission in the context of the “Content Online” public consultation. Although most of the content distributed online is also made available offline, new services specifically designed for the online environment are increasingly appearing in the marketplace, such as services allowing for user-generated content to be made available. Furthermore, it should be noted the online world opens tremendous opportunities for the exploitation of back-catalogue titles that could often have a hard time gaining visibility in the offline marketplace.

2. Are there other types of content which you feel should be included in the scope of the future Communication? Please indicate the different types of content/services you propose to include.

The CMBA considers that the types of creative content and services identified by the European Commission make up an exhaustive list and that other forms of content do not need to be added to the scope of the future Communication.

Consumption, creation and diversity of online content

3. Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of

a violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.

17. Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?

Grouped answer to Q3 and 17:

The CMBA is of the opinion that the present environment could be usefully improved to help unleash the full potential of new creative content services online. In this regard, our proposals can be summarised as follows:

- The European Commission needs to gear up for better implementation and enforcement of single market rules in the enlarged EU, in particular those concerning intellectual property protection, e-commerce and cyber-criminality.
- The review of the EU's "Telecom Package" should be seized as an opportunity for the European Commission to strengthen network users' interests, notably by introducing provisions to ensure that telecom operators and Internet service providers contribute actively and responsibly to the development of a secure and healthy environment for the legitimate exchange and delivery of online content.
- High taxation levels make it difficult to compete internationally. The levels of value-added tax (VAT) applying to e-commerce should notably be trimmed for European creative media businesses to be able to compete on the global marketplace. Today the EU VAT regime discriminates against electronic products and impacts negatively on the launch of new content creative services online.
- Inter-industry standardisation efforts aimed at platform, DRM and content interoperability should be closely followed and supported by the European Commission, notably to make sure that robust and secure digital rights management tools (DRMs) are guaranteed system-wide support and that continuity of security is maintained across platforms in a consumer-friendly, transparent manner.

4. Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?

As users of the networks that make up the information society, the members of the CMBA find it legitimate and appropriate for public policy objectives to be pursued in both the offline and online world. In this regard, we also consider that the regulatory framework should grant the creative and media sector the opportunity to develop self-regulatory initiatives as a means to meet public policy objectives. This should in

particular be the case in the online environment. Clearly, it is in the interest of the industry to make sure that these self-regulatory initiatives be trustworthy and efficient.

Among the public policy objectives that should vigorously be pursued in the online world, we would like to emphasise the protection of content as a means to preserve and strengthen creativity. In this regard, the CMBA takes issue with an often-heard argument that seeks to pit consumers and business interests against each other, when in fact it is obviously and ultimately in the interest of both consumers and content producers that the right conditions are in place for creativity to blossom and for a wide menu of choices to be made available.

It has also become fashionable for some to claim data privacy constraints to plead against effective actions to tackle infringing activities by individuals. Legitimate data privacy protection must be safeguarded. This can be achieved without undermining other public policy objectives. It is essential to ensure that infringing activities are not protected by anonymity and that data privacy rules are not used to shield illegal activities or invoked by operators hiding behind privacy protection as a pretext for avoiding any responsibility for the behaviour of their customers.

5. How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?

CMBA members are very excited by the opportunity to make content available through new platforms and services online, as demonstrated by the steady weekly increase in the availability of new legal services online, such as “On-Demand”, “Subscription”, Advertising Supported”, and “Download-to-Own” offers. To facilitate this development, ensuring content and platform interoperability has become a top priority for the creative and media sector to make sure that consumers are able to enjoy a wide variety of content in a secure way and on different platforms.

In the CMBA’s view, interoperability and security are not mutually exclusive but an equilibrium needs to be struck between the two objectives, whereby neither of the two comes at the expense of the other. The CMBA submits that there is a substantial incentive for the marketplace to deal with this question and thus to come up with appropriate solutions, as illustrated by several inter-industry standardisation efforts currently underway to address issues of content, platform and DRM interoperability (e.g. the Digital Video Broadcasting Project, the Coral consortium, the Digital Living Network Alliance...). Clearly, industry-led efforts of this kind deserve full and active support by the European Commission.

As to the legal environment, the CMBA thinks that the EU set the right basis for a healthy and legitimate online marketplace for content back in 2001 when it adopted the 2001/29/CE Directive. It also established a balanced mechanism to deal with the interface between technological measures and exceptions, if and when, any

problems arise. The Directive also refers in passing to the related issue of interoperability (see Recital 54 of the Directive). At this stage, the CMBA would caution against any heavy-handed regulatory approach to the question of content “interoperability” and suggest that the marketplace should be given a chance to deal with possible issues as and if they arise, notably through the deployment of innovative business models.

6. How far is cultural diversity self-sustaining online? Or should cultural diversity specifically be further fostered online? How can more people be enabled to share and circulate their own creative works? Is enough done to respect and enhance linguistic diversity?

The members of the CMBA share the conviction that the online world has the potential to be hugely beneficial for cultural diversity, both in terms of available information and of linguistic diversity. A quick browse through the Internet suffices to demonstrate that in no other point in time has so much information been available to the citizens “at the click of a mouse”. Likewise, the CMBA believes that the online environment could be a boon for the production of creative works and the development of new online services for content delivery, be it “mainstream content” or works catering to smaller “niche markets”.

However, for the promise of self-sustaining cultural diversity to materialise, the CMBA strongly believes that the creative content sectors all over the world need continued incentive to be substantial innovators. The popular – or at least often heard – idea that the framework on intellectual property rights (IPR) is an obsolete concept from the pre-digital era is based on the fallacious assumption that because technology now allows almost limitless access to content from anywhere and anytime, IPR should be diminished accordingly and that creativity does not really need to be incentivised to thrive.

Competitiveness of European online content industry

7. If you compare the online content industry in Europe with the same industry in other regions of the world, what in your opinion are the strengths and weaknesses of our industry in terms of competitiveness? Please give examples.

Europe is a centre for excellence in the creative and media industries. There is no other part of the world that has the ability to compete with the United States in providing the creative content that consumers can enjoy worldwide. However, if Europe is going to rise to the challenge of becoming the world’s leading knowledge-based economy as per its “Lisbon” strategy, it must create the conditions to allow its creative and media businesses to develop further.

The CMBA has therefore consistently called for:

- **Encouraging migration to legal delivery services**

Legal online services are an exciting opportunity for the creative and media industries to reach consumers in new ways. The EU should play its role in encouraging migration to legal services and should foster a dialogue between the creative and media industries and those industries who seek to develop new distribution channels for our content, in particular electronic communications services and network providers to address the problem of intellectual property theft.
- **Increasing competitiveness**

Regulatory burdens, heavy social costs and high taxation levels make it difficult to compete on equal terms with the U.S. and other regions. CMBA calls on the EU to reduce these burdens to free its creative and media industries and allow them to compete in a global marketplace.
- **Availability of creative content**

The creative industries embrace new and various business models that offer creative content to the consumers. No one business model is or will be effective at meeting the diverse needs of European creators, industry and consumers. Dictating a single model or restriction on the industry's freedom to license would penalise creators and eliminate incentives to invest in new and diverse content that can drive new business models, products and services. Allowing for a more diverse range of business models in turn stimulates investment in more diverse types of creative products and services to the benefit of the entire value chain.
- **Respect for intellectual property rights**

Intellectual property is the cornerstone of the creative and media industries and the measure by which the people who contribute to creativity can be remunerated. The creative and media industries are, however, being threatened by the growing illegal use of protected content. The EU must provide a strong legal foundation, based on intellectual property and create a stronger deterrence against IP crime and online infringement. It should also match the US stance of seeking to pursue IPR infringement actions in third countries.
- **Technological neutrality and interoperability in the distribution of creative products and services**

Platform interoperability is a top priority for the creative sector if the consumer is to have a variety of creative content available securely on different platforms. Robust and secure digital rights management (DRM) solutions need system-wide support so that continuity of security and optimum consumer experience is maintained across platforms.
- **Priority to self-regulation**

The creative and media sector should be given the opportunity to develop self-regulatory initiatives to meet public policy objectives such as consumer protection or protection of minors. It is clearly in the interest of the creative and

media industries that these self-regulatory initiatives be trustworthy and efficient.

- **Stimulating employment**

Heavy social costs limit the potential to expand the number of skilled people employed by the creative industries. The EU must look closely at social costs in the creative industries in order to stimulate employment.

New business models and transition of traditional ones into the digital world

8. Where do you see opportunities for new online content creation and distribution in the area of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?

The membership of the CMBA spans the whole list of services enumerated in this question. At this stage, it is still difficult to make any predictions and we consider that consumer demand will ultimately determine whether and which specific delivery models prevail over others. What is clear already however is that experiments are – and will continue to be – made to determine which model is best suited to each individual case. Indeed, the contractual freedom granted is of crucial importance for viable systems of content delivery to be designed.

As new and various business models are being tested and embraced by creative media industries, it is clear to the CMBA that no one business model could be effective at meeting the diverse needs of European creators, industry and consumers. It is therefore impossible for the CMBA to provide one single response to this question. It is clear that imposing a single model on the industry's freedom to engage in arms-length negotiations would penalise creators and eliminate market-driven incentives to invest in new content and business. A flexible system should allow rights-holders to distribute their content as they deem most appropriate from a commercial point of view, be it on a national, linguistic or multi-territorial basis.

10. Are there any technological barriers (e.g. download and upload capacity, availability of software and other technological conditions such as interoperability, equipment, skills, other) to a more efficient online content creation and distribution? If so, please identify them.

As a general requirement, legal platforms of content delivery must provide a high quality of service. The quality of service would notably include criteria such as user-friendly interfaces, speed of the network, bandwidth, security and application of content protection technologies. For new online services to take off, the level of consumer satisfaction should be at least equivalent to what is being experienced in the digital off-line world.

As to technological barriers to a successful transition from the offline to the online world as well as from the analogue to the digital environment, the CMBA would like to draw the attention of the Commission to the following imperatives:

- The need to improve the security of the online environment by facilitating enforcement efforts against copyright theft and other kinds of cyber-criminality as well as to accelerate the uptake of robust DRM technologies.
- The need to deal with legacy problems slowing down the transition from analogue to digital media, such as the unauthorised re-transmission of unencrypted over-the-air digital television signal, digital stream ripping and the analogue hole (whereby protected digital content can be stripped of its associated usage rights by converting to analogue format and then back to digital).

11. What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of the different players to secure a sustainable revenue chain for creation and distribution online?

Creative media businesses are launching new services and experimenting with business models to secure revenue streams and satisfy consumer demand for more flexibility and choices in the consumption of content. These revenue streams are obviously crucial if funding is to be secured for the ongoing distribution of new works and services in the future. In this regard, the finger can clearly be pointed at widespread digital piracy as the single biggest threat to the investment returns of creative media companies engaged in the legitimate distribution of content online.

The CMBA strongly supports a three-pronged approach aimed at cleaning up the online marketplace and creating a healthy “win-win” situation for all legitimate stakeholders, above all consumers, access providers, and content producers:

- Public authorities need to deter IP theft and online infringements through a combination of effective legislation and stronger enforcement activity.
- Inter-industry dialogue should be pursued and supported with a view to create a common front of all stakeholders to encourage the migration to legitimate delivery services and further develop a healthy electronic marketplace.
- Awareness-raising initiatives should aim at informing citizens about the value of intangible products and services. Public-private partnerships could play an important role in this regard, both at the EU and national levels.

Payment and price systems

12. What kinds of payment systems are used in your field of activity and in the country or countries you operate in? How could payment systems be improved?

The online delivery of content and services displays a wide variety of business models characterised by almost as many payment systems, such as subscription

fees, pre-paid arrangements, direct payment, etc. CMBA clearly shares an interest in the development and improvement of current payment systems through innovations facilitating, e.g., micro-payment and geo-location. Finally, in order to build and maintain consumer trust in the e-commerce environment, CMBA supports private-public partnerships to fight back instances of cyber-criminality, such as identity theft and credit card frauds.

13. What kinds of pricing systems or strategies are used in your field of activity? How could these be improved?

As in the offline world, the pricing systems and strategies characterising the online delivery of creative media products and services are defined by the marketplace and result from the basic interaction between supply and demand. Changes and improvements follow an iterative process that is evolving particularly fast in the current experimental stage where individual market players are actively testing consumer reactions to various models of online delivery.

As a general principle, the CMBA finds it very important and healthy for this iterative process of experiments to continue freely. It would strongly caution against any form of outside market intervention that could only have a chilling effect on the development of the online marketplace.

Licensing, rights clearance, right holders remuneration

14. Would creative businesses benefit from Europe-wide or multi-territory licensing and clearance? If so, what would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?

15. Are there any problems concerning licensing and / or effective rights clearance in the sector and in the country or countries you operate in? How could these problems be solved?

Grouped answer to Q14 & 15:

It should be pointed out that the management of rights may differ greatly depending on the type of content considered¹. The CMBA submits that there cannot be any single response to whether creative media businesses should support a particular model. The answer to this question will – and should – vary from one instance of commercial negotiation to another. The more important issue at stake here is therefore the need to preserve the contractual freedom that currently allows parties to

¹ Management of rights in the field of publishing is rarely done by collective management but by the publishers themselves. Licensing is done on a territorial/linguistic basis. In this regard, i.e. when rights clearance is governed by systems of collective management, the CMBA would like to stress its strong support for all initiatives that foster a culture of transparency and good governance within collecting societies, in order to enable all relevant stakeholders to make informed decisions as to the licensing model best suited to their needs. As a general matter, efficient reciprocal agreements would be beneficial to both right-holders and users.

enter into commercial negotiations with a view to define the most appropriate arrangement in each individual case. When considering such questions, it seems appropriate to recall that creative and media businesses engage in this kind of contractual negotiations on a daily basis. Rights clearance is an integral part of the activity of creative media businesses and is in fact what make content production and delivery possible and viable in the first place.

The current diversity of “licensing models” in the online marketplace is what drives the launch of new services. As new and various business models are being tested and embraced by creative industries, it is clear to the CMBA that no one business model could be effective at meeting the diverse needs of European creators, industry and consumers. Hence, what is needed is a flexible system based on contractual freedom, not a one-size-fits-all solution. The current flexible system that allows rights-holders to license their content as they deem most appropriate from a commercial point of view – be it on a national, linguistic or multi-territorial basis – should therefore be preserved.

16. How should the distribution of creative content online be taken into account in the remuneration of the right holders? What should be the consequences of convergence in terms of right holders’ remuneration (levy systems, new forms of compensation for authorised / unauthorised private copy, etc.)?

The basis for the remuneration of rights holders in an online world characterised by convergence should more than ever stem from contractual negotiations conducted between right holders and users, except in the cases where collective management of rights is mandated by law.

Contrary to what is suggested by the wording of Question 16, it should be understood that levies were never meant to make up for unauthorised copying (which simply amounts to piracy) but only as a compensation for the kind of legal private copy exceptions that exist in certain jurisdictions but do never, in accordance with international and European law, extend to copies made from illegal sources.

The CMBA is of course fully aware that DRMs and levies are bound to co-exist for a certain period of time and would like to recall that the EU’s Copyright Directive provides for this coexistence.

Legal or regulatory barriers

17. Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?

See grouped answer given above to Q3 and Q17.

18. How does the country you mainly operate in encourage the development of creative online content and services?

It is probably fair to say that, taken as a whole, the membership of the CMBA operates throughout the whole world. However, we would here like to limit our reply to initiatives being pursued at the EU level. As a general matter, it should be known that the CMBA supports the idea that public authorities can play a useful role to encourage the development of legitimate offers of content and services online. We notably believe that public authorities can be instrumental in fostering a dialogue between the creative and media businesses and the industries that seek to develop new distribution channels for online content and services, in particular telecom operators and Internet service providers.

This being said, whereas all publicly-supported moves to develop a legitimate “content online” marketplace should be welcomed, the CMBA would submit that two cumulative criteria need to be met for any effort to be truly and meaningfully effective:

- Whether through sector-specific approaches or by way of a larger exercise, any push to develop content online should ultimately address all forms of copyrighted content. Clearly, the current “Content Online” initiative could play a very important role in this regard at the EU level.
- Declarations of a “political” nature about “content online” need to be translated into robust inter-industry codes of conduct that truly encourage – rather only than call for – the emergence of new services in a secure and consumer-friendly environment. Indeed, experience shows that whether at the EU or at the national level, all initiatives that have to date sought to bring the various stakeholders to the same negotiating table have shared a tendency to produce positive declaratory results but relatively little in terms of concrete commitments.

Release windows

19. Are “release windows” applicable to your business model? If so, how do you assess the functioning of the system? Do you have proposals to improve it where necessary? Do you think release windows still make sense in the online environment? Would other models be appropriate?

“Release windows” are a well-known feature for those within the CMBA membership that are active in the audiovisual sector. It is notably a characteristic of the film industry with “downstream” implications for operators active in the sector. As a general comment, the CMBA notes that “windows” simply reflect the freedom to establish specific business models to recoup investments in the most efficient manner. Indeed, the multiplication of distribution channels in the digital environment clearly brings with it a higher degree of complexity and necessitates more flexibility. In this respect, the CMBA would warn against any sweeping measures seeking to mandate particular models and thereby limiting the content providers’ ability to take into account factors linked to culture, local tastes, national habits, etc.

Piracy and unauthorised uploading and downloading of copyright protected works

21. To what extent does your business model suffer from piracy (physical and/or online)? What kinds of action to curb piracy are taken in your sector/field of activity and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between “small” and “big” ones?

The copyright industries represented within the CMBA are affected by both physical and online piracy in a variety of ways (e.g. smart-card/black box piracy, signal theft, unauthorised file-sharing of copyrighted files and other forms of Internet piracy on news groups and FTP servers, street-corner sales of counterfeits, unauthorised use of mast head and trademarks, etc. In sum, piracy in all its manifestations has caused a loss of investment in content creation, declining sales in the legitimate market, thousands of lost jobs and lost tax revenues for government across the EU.

To grasp the scale of the problem, it is probably telling enough to note that in January 2006, the number of infringing files (music files only) available on the internet at any one time was estimated at 885 million, of which 775 million were available on P2P networks and the remainder on websites². This is a daunting figure, especially considering that it does not even include other kind of files, such as newspaper/magazine articles, books, films, audiovisual programmes... etc³.

CMBA members are supporting actions to curb piracy in Europe, notably through co-operation with national anti-piracy organisations, and we are seeking to assist law enforcement authorities throughout Europe in efforts to carry out investigations, raids and seizures. The CMBA is also supportive of European and national efforts to encourage the migration to legal services through inter-industry negotiations. It is also our firm belief that Europe must provide a strong legal foundation, based on intellectual property, if it wants to have the internationally competitive creative industries that are the *sine qua non* condition of a world-class knowledge-based economy. The CMBA is aware that piracy can unfortunately and probably never be totally eradicated but we are eager to keep copyright theft at a sufficiently low level to preserve the virtual circle whereby people who contribute to creativity can be remunerated and the production and distribution of new creative content is made possible by the reinvestment of revenues stemming from existing creative content.

As to the semantic differences made in the wording of Question 21, the CMBA would like to caution against the usefulness of these distinctions since most of the P2P clients that are today used to exchange illegal content operate in such a way that as

² Source : IFPI Digital Music Report 2006.

³ For specific figures regarding individual sectors represented within the CMBA, see individual submissions made by CMBA members.

soon as content (or any portion of that content) is downloaded, the content (or portion of that content) is simultaneously made available for upload from that person's computer, sometimes without that person's knowledge. Some clients and networks go further so as to actively punish users if they do not make downloaded content available for upload. Finally, on "big vs. small" pirates, it should be kept in mind that while the identification of the original uploader that made a specific piece of content available might be very useful for investigative purposes, the essence of the piracy problem today remains the fact that so-called "small piracy" is taking place on a massive cumulative scale.

22. To what extent do education and awareness-raising campaigns concerning respect for copyright contribute to limiting piracy in the country or countries you operate in? Do you have specific proposals in this respect?

The CMBA considers that awareness-raising campaigns concerning copyright and piracy can play a useful role. In this respect, the Commission and many stakeholders are certainly right in including communication efforts as one of the three pillars of a successful migration to legitimate online services of content delivery (alongside commercial agreements and the joint fight against piracy).

Nevertheless, the CMBA would advise against lending too much weight in the first place to the arguments put forward by anti-copyright activists whose high efficiency at using new communication channels as a lobbying tool clearly is inversely proportional to their societal representativeness. This statement can notably be illustrated, at the market level, by the tremendous commercial success of the DVD format – although being criticized by anti-copyright activists for its business model based ever since its inception on a copy-protection tool.

23. Could peer-to-peer technologies be used in such a way that the owners of copyrighted material are adequately protected in your field of activity and in the country or countries you operate in? Does peer-to-peer file sharing (also of uncopyrighted material) reveal new business models? If so, please describe them?

The CMBA believes that peer-to-peer (P2P) has a tremendous potential for the legal delivery of online content, notably to manage fast and efficient delivery of large multimedia files that can clearly benefit from the speed and bandwidth efficiency provided by this technology. In a nut-shell, the idea is to bring together the controlled security that right holders need in any digital distribution channel, with the convenience and speed of a decentralised network meeting consumer expectations.

Some members of the CMBA have already started to put theory into practice by striking licensing deals for online content delivery using legitimate P2P platform operators (see notably <http://www.snocap.com> in the music sector and the "in2movies"

– <http://www.timewarner.com/corp/newsroom/pr/0,20812,1156926,00.html> – joint

venture for the delivery of television programmes and films using super-distribution technologies).

Rating or classification

24. Is rating or classification of content an issue for your business? Do the different national practices concerning classification cause any problem for the free movement of creative services? How is classification ensured in your business (self-regulation, co-regulation)?

The creative and media businesses represented within the CMBA have a long experience of “content classification”, whether through self-regulation arrangements such as the “PEGI” ratings system for video games, co-regulation schemes like NICAM’s “Kijkwijzer” in the Netherlands or tightly-regulated system like in Norway where a government agency is notably tasked to approve all films before commercial exhibition. In the view of the CMBA, the establishment of classification systems to shield children against harmful or inappropriate content is a legitimate public policy objective that ultimately benefits society as a whole. In this respect, the CMBA understands the logic of having national practices that vary throughout Europe regarding classification. As a matter of fact, the CMBA believes that a regulated and harmonised approach of online content classification would simply fly in the face of the cultural diversity that characterises the European media market.

While strongly believing in the merits and effectiveness of self-regulatory practices – rather than strictly-regulated tools – to govern the classification of content, the CMBA considers that rating tools need to be carefully tailored at the local level to reflect cultural specificities and sensitivities. As also acknowledged by a study commissioned by the European Commission in 2003 on rating practices in the audiovisual sector, the CMBA shares the opinion that neither industry, nor consumers, nor the internal market really seem to be calling for more harmonisation of rating practices in Europe at this stage.

Digital Rights Management systems (DRMs)

Digital Rights Management systems (DRMs) involve technologies that identify and describe digital content protected by intellectual property rights. While DRMs are essentially technologies which provide for the management of rights and payments, they also help to prevent unauthorised use.

25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?

26. Do you have access to robust DRM systems providing what you consider to be an appropriate level of protection? If not, what is the reason for that?

What are the consequences for you of not having access to a robust DRM system?

27. In the sector and in the country or countries you operate in, are DRMs widely used? Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?

28. Do you use copy protection measures? To what extent is such copy protection accepted by others in the sector and in the country or countries you operate in?

29. Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability?

Grouped answer to Q25, 26, 27, 28 and 29:

For ease of reference and clarity, the CMBA would like to offer a consolidated response on the topic of digital rights management tools (DRMs) and technological protection measures (TPMs) addressed in Questions 25 to 29. Although we have grouped these questions, the CMBA finds the European Commission's separation made between DRMs and TPMs perfectly valid: DRMs and TPMs are clearly two distinct notions. Whereas DRMs refer to systems for managing offers to consumers of copyright protected products, TPMs correspond to a software, service or device that provides technical protection against copyright infringements and facilitate secure distribution of copyright works.

DRMs and TPMs are not a new feature of the creative media landscape. They have been around for a long time, as for instance illustrated by the systems of conditional access used in the broadcasting sector and the fact that DVDs have been copy-protected ever since the launch of the format in 1997. The use of DRMs or TPMs varies across the creative media sectors but it is the CMBA's opinion that rights holders should be free to choose whether or not to use them, and this choice is to be made on the basis of the various business models developed to deliver content. In this respect, the two great merits of DRMs are (i) that they help ensure a secure environment where rights can be licensed and enforced and (ii) that they enable to more closely meet diverse consumer expectations of new formats and services as well as varying prices and consumption models.

In terms of "DRM robustness", the CMBA submits that the increasing level of DRM uptake demonstrates the faith of the marketplace in the potential of DRMs to meet the converging objectives of rights holders and consumers, namely preserving the market incentive for rights holders to satisfy effective demand for innovative products and guaranteeing consumers the diversified menu of choices that they legitimately expect. The optimism of the marketplace should however not hide the fact that real mass-market uptake of DRM technologies will probably truly happen only once a robust compliance policy is in place based on agreed inter-industry standards

allowing for true content interoperability. In this context, solutions to a certain number of “legacy” problems are clearly needed. It is the CMBA’s strong belief that the European Commission could play a useful role as facilitator and supporter of these standardisation efforts. Inter-industry solutions could go a long way in helping realise the full potential of both Europe’s content industry and of its broadband infrastructure.

Finally, as to user-friendliness, the CMBA would like to emphasise the industry’s efforts to make sure that consumers are clearly aware of both the use of copy-protection technologies and of the usage rights associated with specific pieces of content, notably through clear labeling.

The CMBA would also like to recall that the possibility for consumers to use, exchange and replicate (or, more accurately, clone) copyrighted material on a global scale and at a cost often equivalent to zero has been hugely facilitated in the digital age. In this context, DRMs and TPMs play a crucial role in ensuring a fair balance the concomitant needs of ensuring both remuneration to the rights-holder and satisfaction of the consumer.

Complementing commercial offers with non-commercial services

30. In which way can non-commercial services, such as opening archives online (public/private partnerships) complement commercial offers to consumers in the sector you operate in?

The CMBA supports the widest possible legitimate dissemination and diffusion of the works its members produce or publish, be it through online platforms or offline retailers. As a matter of fact, all these works are increasingly becoming available in digital formats. Even in the publishing field, where printed products remain the vast majority, the various sectors (e.g. books, magazines, newspapers, etc.) are increasingly migrating to electronic media.

In this context, digital collections (public and private) will clearly become an increasingly important vector for the dissemination of content, competing with physical and online retailers. As the CMBA sees it, some of this activity will take place through commercial channels and, in other cases, through private/public sector libraries. However, unless the relevant act falls within the limited scope of national copyright exceptions, acquisition and dissemination of content under copyright will have to be carried out on the basis of license agreements with right holders, as is already the case in the analogue environment.

In other words, should a public/private sector European digital library wish to provide access to European content, it should do so through contracts between rights holders and users in the same way as is common practice for physical content and always in a manner not interfering with the normal exploitation of such content by the rights holders, as foreseen by applicable European and International law. The CMBA is of the firm opinion that respecting these legal requirements will serve to encourage

increased access to European works and promote the development of innovative business models without risk of unbalancing the whole creative sector.

What role for equipment and software manufacturers?

31. How could European equipment and software manufacturers take full advantage of the creation and distribution of creative content and services online (devices, DRMs, etc.)?

The CMBA membership is convinced that the “Content Online” marketplace bears tremendous potential and that it is ultimately in the interest of all stakeholders – be it consumers, content providers, ISPs, ICTs– to make sure that all conditions are in place for a healthy environment of legitimate content delivery to develop and thrive. In its specific answer on digital rights management tools (DRMs), the CMBA expressed its conviction that DRMs have a key role to play to sustain new business models in the online world offering consumers exciting and novel ways of enjoying an ever broader variety of copyright-protected content. For this process to be accelerated, the CMBA considers that the ICTs have a key role to play by ensuring DRM interoperability and the robustness of technological protection measures (TPMs) against circumvention attempts.

Successful inter-industry cooperation, notably in the field of standardisation, has a key role to play in the mass-market uptake of DRM technologies and in the establishment of an effective compliance policy allowing for true content interoperability in the online world. Examples of challenges that need and could be overcome through government-supported standardisation processes notably include:

- Improvement of the tamper-resistance of software-based DRM solutions and strengthening of the joint fight against hacking tools.
- Solutions to some legacy problems slowing down the transition from analogue to digital media, such as the unauthorised re-transmission of unencrypted over-the-air digital television signal, digital stream ripping and the analogue hole (whereby protected digital content can be stripped of its associated usage rights by converting to analogue format and then back to digital).

What role for public authorities?

32. What could be the role of national governments / regional entities to foster new business models in the online environment (broadband deployment, inclusion, etc.)?

The CMBA believes that public authorities can play an important role in encouraging the development of a legitimate “Content Online” marketplace, which allows market players to develop new business models for the benefit of consumers. Concretely, we would submit that the action of public authorities should focus on the three priorities:

- Deterrence of IP theft and online infringements through a combination of effective legislation and strong enforcement activity.
- Support for inter-industry dialogue with a view to create a common front of all stakeholders in favour of legitimate delivery services and a healthy e-commerce environment.
- Development of awareness-raising initiatives – possibly through public-private partnerships – to inform citizens about the value of intangible products and services.

33. What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?

A series of issues and challenges raised in the CMBA's response to this Questionnaire calls for specific actions to be taken at the EU level. Without going into the in-depth explanation provided above under each question, we will only here enumerate the "headlines" of the specific actions envisaged:

- A strengthening of network users' interests in the context of the review of the EU's "Telecom Package". This by introducing regulatory provisions to ensure that network operators/providers contribute actively and responsibly to a secure and healthy "Content Online" environment.
- Continued encouragement for the migration to legitimate content delivery services, through robust inter-industry codes of conduct and/or concrete legislation.
- The establishment of stronger deterrence against IP theft and cyber-criminality in general, notably by facilitating enforcement efforts.
- A light-touch regulatory approach to the e-commerce environment, notably with regard to taxation levels (VAT). Indeed, today the EU VAT regime discriminates against electronic products and impacts negatively on the launch of new creative services online.
- More room for self-regulatory arrangements that are often the most efficient way, especially in the online world, to meet public policy objectives.
- A strong support for industry-led standardisation efforts aimed at fostering Platform, DRM and Content Interoperability (for example within the Digital Video Broadcasting Project).
- The further development of awareness-raising initiatives to inform citizens about the value of intangible products and services. People who would never steal in a shop should understand the clear damage caused by online theft.
- Finally, before seeking further harmonisation of single market rules, the Commission needs to focus on better enforcement and implementation of regulations already currently in place.