CMBA

CreativeMediaBusinessAlliance

15 JUNE 2006

REPLY OF THE CREATIVE MEDIA BUSINESS ALLIANCE (CMBA) TO THE

PUBLIC CONSULTATION ON THE FUTURE OF THE INTERNAL MARKET

We accept this reply to be published.

Profile of the respondent
*Please indicate which of the following categories you represent: Private citizen / Business / Representative organisation / Public administration / **Other***

The Creative Media and Business Alliance (CMBA) is an informal grouping of some of Europe's top media and creative businesses and industry associations. The members of the CMBA are the following: ACT, Bertelsmann, Groupe Canal+, EACA, EMI, ENPA, EPC, FAEP, FEP-FEE, IFPI, IVF, Lagardère, Mediaset, MPA, Reed Elsevier, Sony Pictures, Sony Computer Entertainment, Sony BMG Music Entertainment, Time Warner, Universal Music Group International, The Walt Disney Company, Warner Music International.

Your reply to the questions in the consultation document
As indicated in the consultation document we do not expect all stakeholders to be concerned by all questions asked. However, we would be most grateful if you could state hereunder your replies to the questions that matter to you.

At this stage, the CMBA would like to provide comments on the segments of the working paper leading up to "Question 3" (i.e. the choice of priorities for future internal market policy) and "Question 7" (i.e. Intellectual Property Rights). Our replies follow on the next pages.

CMBA
CreativeMediaBusinessAlliance

Question 3 (Priorities for future internal market policy): Do you agree with this choice of priorities? Are there others in your view?

The CMBA supports the five priorities listed by DG MARKT in its discussion paper and would also like to emphasise that safeguarding the principles of mutual recognition and country-of-origin is the most effective way of ensuring free circulation of creative goods and services. However, regarding "Priority 3" ("Better implementation and enforcement"), we are concerned by the fact that the paper seems to solely emphasise the need to create partnerships between the European Commission and the Member States. While generally understanding the merits of a "partnership approach", we consider that, at best, it can only provide a partial answer to the challenge of policing single market rules in an expanding EU.

A European single market based on the rule of law notably needs to guarantee that legal certainty, individual rights and equal treatment for market participants throughout the 25 Member States are not put into question. In this endeavour, the existence of a robust compliance policy is crucial. With regard to failure of a Member State to fulfill its obligations, it is probably telling enough to mention that in 2004 (for the "EU-15"), 193 new infringement proceedings were brought in front of the Court by the Commission and that, during the same period, the Court of Justice declared that a Member State had failed to fulfill its obligations under EC law in 144 cases (see page 9 of the statistical section of the Court's 2004 Annual Report at http://www.curia.europa.eu/en/instit/presentationfr/rapport/stat/st04cr.pdf). Although communication between the Commission and an infringing party is a crucial part of any infringement procedure, these figures clearly illustrate the fact that implementation and enforcement cannot rely on good faith alone.

Today, 40% of the EU's Member States have been members of the "club" for slightly over two years only. By 2009, the numbers of "new" Member States with less than 5 years single-market experience might reach almost 50% of the full EU membership. This is not to say that a "new" member is more prone to non-respect of its EU obligations than an "old" member (as a matter of fact, out of the 144 cases mentioned in the paragraph above, 81 concern the original six Member States of the EEC) but it clearly points to the need for the European Commission to gear up for the management of more diversity within the internal market. This is the main reason why the CMBA supports the Commission's

objective to ensure better implementation and enforcement of single market rules in an enlarged EU. However, we strongly believe that this should entail a clear commitment to more swiftly deal with cases of non-conformity or incorrect application of single market rules by Member States.

The "partnership approach" mentioned in DG MARKT's discussion paper should therefore mainly be focused on streamlining current communication procedures and making sure that systematic follow-up is given to ongoing infringement proceedings. In this regard, the CMBA would like to applaud the Commission for its Communication released on 14 December 2005 (SEC(2005)1658), which clarifies and develops the policy of the Commission in asking the European Court of Justice to impose a periodic penalty payment and a lump sum on a Member State that fails to comply with a judgment of the Court, in line with Article 228 of the EC Treaty. Streamlined procedures, effective follow-up of infringement proceedings and respect of ECJ judgments should be the cornerstones of the Commission's stated objective to ensure better implementation and enforcement of single market rules.

Question 7: Do you consider that the current IPR regimes foster growth and innovation? In your experience, where is more focus or action needed?

As an alliance of creative and media businesses that produce, disseminate and invest in "Content" that educates, informs and entertains Europe's citizens, the CMBA would like to focus its reply on the topic of "copyright and related rights", leaving aside issues pertaining more specifically to patents, trademarks and design.

In particular, we would like to comment on the discussion paper's assertion that the current diversity of "licensing models" in the online marketplace puts a brake on the development of innovative online services. In fact, the opposite is true – it is content that drives these new services. We would also like to provide some thoughts regarding the management of so-called "online rights", before suggesting areas where more attention is required to ensure that the current IPR regime fosters growth and innovation.

As a first point, it should be said that the CMBA strongly disagrees with the discussion paper's suggestion that the contractual freedom granted to rights-holders to license their content (e.g. in some cases, on a territorial basis) would somehow constitute an

obstacle to the launch of innovative online services made available across borders. Limitations on contractual freedom are the kind of regulatory interventions that throw up barriers. 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. In this context, dictating a single model or restriction on the industry's freedom to license would penalise creators and eliminate market-driven incentives to invest in the right sort of new and diverse content that can drive new business models, products and services. As an illustration in the film sector, it is not unusual for independent producers in Europe to depend on pre-sales to individual markets to finance their projects; an imposed EU-wide license would therefore undermine an important source of financing and thus be detrimental to cultural diversity by ultimately restricting the menu of choices for consumers. Hence, what appears to be needed is a flexible system based on contractual freedom, not a one-size-fits-all solution. A flexible system should allow 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.

The discussion paper refers to the European Commission's October 2005 Recommendation on the management of online rights. As a preliminary remark, it should here be recalled that this recommendation concerns instances of collective management of copyright and related rights for legitimate online music services, it is thus not really aimed at "a variety of online services" as the discussion paper seems to suggest. Rights management may differ greatly depending on the type of content; e.g. in the world of book publishing, collective management is rather the exception.

As a general view, the CMBA takes the position that right-holders and commercial users of copyright-protected material should be given a choice as to their preferred model of licensing. We note that the recommendation acknowledges that different online music services might require different forms of EU-wide licensing policies. It does not mandate the pan-European licensing of rights but simply opens up this licensing model possibility. Furthermore, the CMBA supports any initiative that fosters a culture of transparency and good governance within collecting societies enabling all relevant stakeholders to make informed decisions as to the licensing model best suited to their needs.

Finally, as a specific answer to "Question 7", the CMBA would like to stress that the creative and media businesses are more than a

mere driver for technological development. Indeed, a dynamic and competitive Information Society will not be created by hardware technology and distribution networks alone. Instead, those who make the new roads of the Information Society worth traveling are the one that should be put at the centre stage, i.e. the creative and media businesses. In this framework, rather than seeking to restrict the contractual freedom of right-holders and/or considering IP protection as a possible obstacle to growth and innovation in the Information Society, the emphasis needs to be clearly put on encouraging the migration to legal delivery services and fostering a dialogue between the creative and media industries and those who develop new distribution channels for our content, notably network providers, to address the problem of intellectual property theft. The current IPR regime is – and should remain – 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 severely hurt by rampant piracy. The EU must therefore defend a strong legal foundation, based on intellectual property, and create strong deterrence against IP crime and online infringement.