



**EPC** | European  
Publishers  
Council

**COMMENTS OF THE EUROPEAN PUBLISHERS COUNCIL**

on

**COMMUNICATION FROM THE COMMISSION ON CREATIVE CONTENT  
ONLINE IN THE SINGLE MARKET**

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**And Response to the Questionnaire**

**February 2008**

[www.epceurope.org](http://www.epceurope.org)

**Part 1 - Introduction and Executive Summary**

The European Publishers Council (EPC) is a high level group of 29 Chairmen and Chief Executives of Europe's leading media corporations whose interests span newspapers, magazines, periodicals, books and journals, online database and internet publishing and, in many cases our members have significant interests in private commercial television and radio. A list of our members is attached.

EPC welcomes the Commission's Communication and accompanying Working Document which are timely, clear and insightful. The Communication correctly recognises that encouraging the development and availability of creative content in the online environment is a central EU policy objective as a key component of the i2010 strategy. Put simply, it is in the interests of all stakeholders that content is cherished in the online world.

Furthermore, the Commission rightly acknowledges the importance of copyright's role in encouraging and facilitating the development and dissemination of content online and in realising these policy objectives.

**EPC**

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In Part 1 of our Submission, we focus on a number of market trends highlighted by the Communication and Working Document and then draw our key conclusions based on these trends. These conclusions underpin our replies and comments appearing in Part 2 in answer to the questions contained in the Annex to the Communication.

Many of these trends were apparent at the time of the Commission's Public Consultation on Content Online in the Single Market in 2006 and were the subject of the EPC's Submission to that Consultation.<sup>1</sup> However, developments over the last two years, especially in the continuing growth of intermediary services - notably search engines and social networks - have served to bring certain issues into particularly sharp focus.

We are at a defining moment for the media and content industries. "Traditional" media companies are making the difficult and costly transition to new services whilst maintaining traditional services to meet continuing consumer demand. New players with new services are continually appearing in the market for digital content online. The overriding challenge for the Commission is to ensure that, whilst it encourages new players, it does nothing to hinder or, worse, destroy the ability of established players to develop the market for new services. That is the only way that the Commission can fully realise its i2010 agenda for the benefit of citizens and consumers.

In that context, we welcome the setting up of the "Content Online Platform" as a vehicle to help the Commission meet this challenge. It is vital that the Platform represents all interests. The publishing and media industry is playing a key role in the development of the market for content online. It is at the forefront of developing innovative online services and leading key initiatives such as 'ACAP', which is discussed further below. As such, we are pleased to note that the Commission intends to involve appropriate experts from the publishing industry as active participants of the Content Online Platform.

## MARKET TRENDS

### *1. The market's growth potential*

The Communication clearly demonstrates that the market for content online is rapidly developing and we continue to see growth in innovative services based on a variety of business models to meet consumer demand. Furthermore, it illustrates the market's tremendous growth potential and the critical role which such content plays in fuelling the development of online services across the entire range of digital networks, services and devices.

Within that market, it is worth emphasising that the Table on page 9 of the Working Document shows that in 2005 the publishing industry was the biggest market in terms of revenues from digital distribution/exploitation of content

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<sup>1</sup> [http://ec.europa.eu/avpolicy/docs/other\\_actions/contributions/epc\\_col\\_en.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/contributions/epc_col_en.pdf)

and is projected to remain in that position, or rank just after the games industry, by 2010.

The publishing industry's successful transition to digital distribution will help to realise the Commission's i2010 agenda. If the industry is to succeed in this transition, it needs to grow its paid-for services as well as those which are advertising based. Two key drivers for digital distribution in the publishing industry are (i) the freedom to advertise and develop new forms of marketing communication to support investment in content production and (ii) the ability of Member States to apply a reduced VAT for online publishing services.

## *2. Market still in the early stages of development*

Equally, as the Communication correctly acknowledges, the development of creative content online services in Europe is still at an early stage and is in a state of rapid development and change, both predictable and unexpected.

For example, over the last 12 months nearly all of the major record companies have moved to the distribution of music downloads in 'MP3' format free of technical protection measures<sup>2</sup>. Another example has been the rapid growth in social network sites such as 'Facebook' and 'My Space', built around the sharing of user generated content. A shining example of such rapid growth is the Polish social network site "Nasza Klasa" (Our Class) which in four months grew from zero to seven million users becoming one of the more significant players on the Polish internet market.

## *3. Sectoral differences within the market*

The Working Document is helpful in analysing the different online and other digital markets within the different sectors of the market for creative content online. Whilst there are a number of issues which are common to all sectors, there are important differences between the value chains in each sector. For example, in the publishing industry multi-territory licensing of online rights directly by publishers is already a reality in a number of sectors of the industry. In other cases, such as the broadcasting industry, the granting of multi-platform rights - TV, online and mobile, is increasingly the norm. This serves as an important reminder to avoid adopting 'one size fits all' legal and regulatory measures applying to these markets. Legal or regulatory measures on "one size fits all" basis do not only form a threat to the European publishing industry and its business models but can also easily distort content markets and cultural features in member states with small linguistic and market areas, where advertising markets are relatively small.

We must also note that in some cases, when it comes to online, the type of services a brand can provide go far beyond the initial content offer. It is now almost a standard for newspaper sites to provide video and for TV sites to provide text. Different routes to market may nevertheless lead to very similar

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<sup>2</sup> This development is noted in the Working Document.

online concepts. This is why it is always essential to protect fundamental rights which apply to the press regardless of its method of dissemination as recognised in the Audiovisual Media Services Directive.

#### *4. The significance of publicly funded bodies*

Publicly funded bodies such as schools, other educational institutions, libraries and public sector broadcasters all have a vital role to play in realising the Commission's i2010 agenda. However, it is vital that any measures taken by the Commission under the creative content online initiatives, do not lead to publicly funded online content services that compete with commercial online publishing, educational content or any other commercial online content.

There is a significant risk posed by the proposals in the Communication, especially as regards availability and multi-territoriality licensing of creative content that could result in the misuse of public funding and subsidised creative content services by such publicly funded bodies.

In the online environment, any extension of the role of public institutions, or, in the case of publicly funded broadcasters, their current web-based activities, could easily constitute unfair competition and threaten the development of the European commercial online content industry. The online content industry in Europe is much more vulnerable than traditional offline content or linear audiovisual services because of the role of publicly funded bodies in the provision of online content or services.

It is essential that the Commission takes steps to ensure that this risk is eliminated.

Accordingly, the Commission must ensure that in taking initiatives to advance the realisation of its i2010 agenda (e.g. in relation to the digitisation of archives) it does not undermine the development of legitimate commercial services for creative content online.

#### *5. The importance of advertising*

There is an inexorable rise in the availability of content online. Some of that content is available on a paid for, subscription basis but much of it is available free of charge to the consumer. But "free of charge" should not be confused with "free" where, in fact, it is supported by advertising. In the newspaper and magazine industry, there are many examples of first rate websites providing high quality, information and audio-visual content free of charge to the consumer, supported by advertising.

As a result, there is a direct relationship between the market for online advertising, centred around paid-for search and advertising services such as Google's 'AdSense', and the growth of advertising funded content online services. This link is not confined to the publishing industry, given the growth

of advertising-supported services across the audio-visual sector of the online content market.

But the role of advertising in the media industry, and the issues raised by the relationship between these two industries in the age of digital media, go far beyond digital advertising. The media industry's traditional approach to, and relationship with, advertising is undergoing a revolution.

EPC members' "traditional" businesses as publishers and broadcasters - providing mass markets to advertisers - are in slow but relentless decline. We have been witnessing the rapid transfer of value to the digital arena where "traditional" media are no longer the biggest players. Advertising revenues are going into digital channels, out to the search and technology companies and to the online 'born digital' media companies.

In response, EPC members are taking rapid steps to differentiate themselves from 'born digital' media companies such as:

- ⇒ Looking to the advertising market as a whole (not just digital or traditional media), creating cross media advertising models to engage advertisers and consumers.
- ⇒ Working with the advertiser as a partner, creating brand embedded content concepts - brand entertainment.
- ⇒ Going after the marketing budget not just the advertising budget by working on concepts which bring mass and user-generated media together.

In line with Commissioner Reding's welcome and stalwart defence of the freedom to advertise, it is vital that the Commission appreciates the full extent of these changes in order to ensure that any initiatives it takes to follow up the Communication continue to take full account of, and are sensitive to, these far reaching changes.

## *6. Technology as an enabler*

EPC members are in the business of providing high quality content, including online, to their customers and consumers. That is their raison d'être. It is therefore in their interests to remove barriers to the accessing of content online. That is why EPC has taken a leading role in 'ACAP' (Automated Content Access Protocol) which is destined to become the universal permissions protocol on the Internet as an open, non-proprietary standard through which content owners can communicate permissions for access to and use of their content online to their intermediaries.

This is a prime example of using technology as an enabler, and not as barrier, to the accessing of content online. For further information visit [www.the-acap.org](http://www.the-acap.org)

## 7. *The continuing rise of intermediaries*

Two trends have become very clear over the last two years. First, is the continued growth of search engines and the pivotal role they play in linking online content to consumers of that content and second, the rise of social networks (e.g. 'YouTube' and 'MySpace') and other platforms through which content -user-created and otherwise - is shared.

### KEY CONCLUSIONS

EPC draws a number of key conclusions from these trends.

#### *a) The appropriate regulatory approach to this emerging market*

In our response to the Commission's Public Consultation on Content Online in the Single Market in 2006, we urged the Commission to formulate policy in the light of the following guiding questions and principles, which recognise that the market is still in an early phase and subject to rapid and often unpredictable change:

- ⇒ Is the problem widespread and pervasive; is it having a significant impact in the 'real world'?
- ⇒ Has the market had time to provide a market-based solution to the problem?
- ⇒ Is there a risk of providing a regulatory solution to a non-existent problem?
- ⇒ If regulatory intervention is appropriate, what is the 'lightest' form of regulatory intervention that may be used, consistent with the approach to 'Better regulation? An example of the latter is the European Charter for the Development and Take-Up of Film Online.

EPC believes that this non-statutory doctrine continues to be the right regulatory approach.

As regards the appropriate regulatory measures, EPC continues to advocate self regulation especially as self-regulation has a proven track record of delivering high standards of effective regulation and consumer redress. A good example is the advertising sector where a network of national self-regulatory bodies is grouped together at European level through the European Advertising Standards Alliance (EASA) of which the EPC is a Board member.

EPC is encouraged by, and fully supports, the EC's approach not to rush prematurely to legislation. EPC fully supports the initial steps that the Commission is taking to (i) set up the "Content Online Platform" and (ii) entering into a stage for further consultation before issuing a

Recommendation on Creative Content Online. We shall continue to work with the Commission to provide evidence-based solutions to clearly identified needs where these might exist.

*b) The publishing industry's experience*

It is noteworthy that the publishing industry, which is at the forefront of the development in the market for online content services, is subject to compliance with general laws and to competition laws across Member States but not to sector-specific regulation.

This leads EPC to conclude that rather than continue with the trend, evident in the Audio Visual Media Services Directive, to extend 'audio-visual' style regulation to the market for online content services on demand, the reverse approach is the better and more appropriate to this market in the long term. We recommend that the Content Online Platform examines the opportunities for de-regulation and delegation to self-regulation in areas traditionally covered by statutory legislation. We strongly believe this will have economic benefits to the growth of the sector as a whole, driving Europe's competitiveness in what is now a global market. Furthermore, any sector specific regulation may clash with rights guaranteed in constitutions of Member States. Such an example is Poland, where a licence to operate is granted for radio and television broadcasters which means that the operation of other media cannot (and indeed should not) be licensed. For the press there is an explicit prohibition of licensing.

*c) It is vital to get the balance right between public funding and commercial services*

The Commission should ensure that it fully respects the following essential principles in any initiatives which follow on from the Communication:

- ⇒ It should limit the mandate of public institutions (e.g. educational institutions, libraries and public sector broadcasters), and public financial support of those institutions, to specific clearly non-commercial responsibilities that do not distort the competitive environment of private undertakings.
- ⇒ It should not encourage member states to fund public institutions in such areas where such funding would lead to misuse of public subsidies and unfair competition with commercial online publishers (e.g. the schools start producing their own online education services).
- ⇒ It should not lead to the adoption of any copyright structures in the member states which blur or eliminate the clear roles of private and public players.

- ⇒ Neither EU level nor national public funding should be misused in the production of new public online content or services that compete with European commercial (online/offline) content production. This is because misuse leads to weakening of commercial online content market and decreases the national tax revenues.
- ⇒ It is essential to ensure that the roles of private and public players remain clear and distinctive. For example, in the area of educational publishing the role of teachers and other professionals of the educational institutions is to concentrate on education and teaching and not to be part of publicly funded ad hoc content production. In view of their long tradition of high-quality educational content production, educational publishers play an important role in the development of educated European information society.
- ⇒ Equally, publicly funded broadcasters should be required to limit their expansion online to services connected to their traditional roles, to a clearly defined remit which commanded the public funding in the first place and subject to independent and transparent regulation. Expansion to online publishing and associated commercial activities such as merchandising are anti-competitive and should fall outside a public service broadcaster's remit.

*d) Minimise the role and amount of administrative intermediates*

It is important to highlight publishers' freedom to choose appropriate methods of rights management and primacy of direct licensing. In addition we wish to point out the importance of minimising the role and amount of administrative intermediates.

Measures under the creative content online initiatives should not lead to any artificial structures in the online content market. There is no need for additional collecting societies between publishers and consumers/end-users. Furthermore, any tendency towards mandating collective licensing outside the normal relationship between content owners and their licensing bodies or, worse still, compulsory licensing, should be avoided.

In an online environment, there is a greater risk of diluting European publishers' revenue streams due to a tendency to extend the role of collecting societies in some Member States (e.g. in Finland by introducing a contractual licence scheme). The extension of the role of collecting societies, and other similar middlemen, endangers the future of the online content industry in Europe where individual rights management is the natural choice. Packaging and distribution of online content is a core business of European publishers and broadcasters in an online environment. Collecting societies were founded to manage the mass use of copies of copyrighted works (e.g. photocopying and use of music), where their role is still important. Mass use societies should only cover situations where there are lots of users, the purpose and quantity

of use is hard to identify and there are plenty of right holders, whose works are used, and the sale of these use rights does not form any essential part of their businesses.

*e) Active role on the part of all players in the market*

We have noted the continued rise in the prominence and importance of intermediaries such as the ISPs and telecoms operators in the market for disseminating online content. The quid pro quo for their continuing enjoyment of the immunities from liability that they enjoy under the E-Commerce Directive and Copyright Directive is their acceptance of a more cooperative role with rights holders to counter the use of their platforms or networks to distribute materials which infringe intellectual property rights.

This role is envisaged in the Proposal to amend the so-called ‘Telecoms Package’ by the reference to general authorisations conditions concerning copyright and intellectual property rights<sup>3</sup>.

We would welcome steps taken by the Commission to encourage Member States to ensure that national laws maintain a proper balance between the protection of personal data on the one hand with the enforcement of intellectual property rights on the other. It is right for citizens’ private data to be protected. However, it is wrong if intermediaries can use data protection laws to avoid cooperating with rights holders in enforcement actions in respect of infringing content which is made available through their services. The ECJ’s decision in *Promusicae v. Telefonica* demonstrates that European law requires Member States to strike such a balance.

Here the EPC wishes to state clearly that the duties of ISPs and Telecoms operators in terms of cooperating with requests from rights holders to remove IP infringing material do not, and should never extend to monitoring control over our editorial content online. This remains the preserve of the owners of that content and attempts to remove such content without a direct request to do so by the original publisher would be in gross violation of the fundamental freedom of expression.

*Don’t tax reading*

Although the online daily press is mainly funded by advertising at present many publishers are poised to respond to consumer demand and release more content online on a paid-for subscription model in the case of the press or in eBook and audio-book formats. The expansion of the range and quantity of

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<sup>3</sup> Article 20.6 of the Universal Service proposal requires that subscribers are clearly informed in advance of the conclusion of the contract with ISPs and regularly thereafter of their obligations to respect copyright and related rights. Without prejudice to Directive 2000/31/EC on electronic commerce, this includes the obligation to inform subscribers of the most common acts of infringements and their legal consequences. In Point A.19 of the Annex to the Authorisation Directive allows NRAs to attach to general authorizations conditions concerning copyright and intellectual property rights.

content online will undoubtedly benefit citizens across the European Union and foster cultural diversity. Literacy of European citizens has been maintained at a high level. As citizens, especially the younger generations, choose to access their reading choices online in electronic form we should

take care to continue our responsibilities to foster literacy. This should not be endangered by taxation that would lead to unaffordable prices of multiple and diverse European content in an online environment.

The EPC believes that the production and availability of paid-for online press and books can be promoted by supporting zero/reduced value-added tax ("VAT") rate of online newspapers, journals, magazines and books. This would impact beneficially younger generations of Europeans in particular.

Accordingly, Member States should be allowed to apply zero/reduced VAT rates also to online press and books in addition to print press and books. This issue is closely connected to maintaining the vitality of member states' language, literacy and culture.

## Part 2 - EPC's replies to, and comments on, the questions contained in the Annex: "Creative Content Online - Policy/Regulatory issues for consultation"

### Digital Rights Management

#### *Preliminary Comments on DRM*

Before replying to the specific questions raised on digital rights management ("DRM"), we think it would be helpful to make certain preliminary observations.

We welcome the Commission's observation in the Communication that "*DRM constitute a key enabling technology*" in the development of *...attractive offers and business models for the distribution of digital content.*" As we note below, the 'ACAP' initiative has a key role to play in this respect.

Whilst the Communication correctly draws a distinction between "DRMs" on the one hand and associated Technological Protection Measures (TPMs) on the other, too often the two are confused. As a result, the issue of 'interoperability' becomes confused as well.

We welcome the clarity that the Commission can bring to this debate. Without that clarity, the issues cannot be correctly framed nor the appropriate answers found.

As the Commission is well aware, there are two distinct components in the technologies described by the umbrella term "DRM". The first is standards

(e.g. MPEG 21) which are the key enablers for finding and distributing digital content. Their purpose is to enable the movement of digital content from one technical platform to another in machine readable form by providing, amongst other things, a standardised grammar and vocabulary to identify and describe intellectual property and the rights pertaining to it.

The important point to make here is that this first component is often deployed without the second component in DRM - technical protection measures ("TPMs") (e.g. Apple's Fairplay technology) which are the technical means of enabling of usage permissions or enforcement of usage restrictions. Examples of the deployment of DRM without any TPMs can be found in the publishing industry - see the 'ACAP' initiative<sup>4</sup> which the Commission rightly acknowledges in the Communication and in 'Creative Commons' licences<sup>5</sup> which provide the user with the necessary code which describes the rights attached to licensed content.

This distinction is relevant to the issue of interoperability. There is certainly a real challenge relating to the definition of "interoperability" particularly as it relates to DRM. The following is a generic definition which was proposed in the context of identifier interoperability:

*"Interoperability is the ability of independent systems to exchange meaningful information and initiate actions from each other, in order to operate together to mutual benefit. In particular, it describes the ability for loosely-coupled independent systems to be able to collaborate and communicate."*<sup>6</sup>

As the Commission is well aware, the key to interoperability in this context is the widespread adoption and implementation of common standards - the first component of DRM as described above. Put simply, interoperability in the absence of standards is not possible. There are many different standards required for interoperability from network layer to business layer. 'ACAP' seeks to develop standards for some elements of the business layer, specifically those relating to the unambiguous communication of policy relating to the use of resources.

So lack of interoperability of content across different platforms resulting from an absence of standards is an entirely separate issue from lack of interoperability which results from the deployment of TPMs which may limit the use content across multiple platforms

Within the legal framework created by Article 6.4 of the Directive, rights holders should be free to deploy TPMs. Whether they choose to do so will be determined by market conditions and, ultimately, by the consumer. In that context, we would reiterate the observation we made under the 2<sup>nd</sup> of the

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<sup>4</sup> [www.the-acap.org](http://www.the-acap.org)

<sup>5</sup> <http://creativecommons.org/license>

<sup>6</sup> Developed by Mark Bide, Rightscom

“market trends” noted above regarding the move towards ‘TPM free’ services in the music industry.

The key points to stress here are:-

- ⇒ DRM, understood in this broader context, is a key enabler, and not a barrier to, the development of business models for the distribution of digital content.
- ⇒ The Commission should encourage voluntary means for standards adoption. But it must be market led and should not be mandated.

*“1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?”*

For the reasons given in our preliminary comments on DRM, EPC agrees that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? As stated above, we consider that the role of the Commission should be to encourage standards adoption by market-led, voluntary means. The watchword should be: “let the market decide.”

The main obstacles to fully interoperable DRM systems are, as noted, the absence of adoption of all the standards required for interoperability from network layer to business layer.

As regards TPMs, the move of all the major record companies towards the offering of music in MP3, TPM-free (and thus interoperable) formats as a competitive response to Apple, demonstrates the fact that the evolution of the market driven by consumer demand will ultimately control the deployment - or not - of TPM systems. This supports the view that further regulatory intervention at this stage to mandate interoperability would be premature.

### **ACAP**

As regards “commendable practices”, EPC is a leading member of ACAP which was launched on 29 November 2007 as a workable, non-proprietary global permissions tool to facilitate the relationship between content owners and search engines. ACAP is all about *unlocking* content. At the heart of ACAP is the development of open, flexible and extensible enabling standards. The guiding principles of ACAP are:

- ⇒ Machine-to-machine communication.
- ⇒ Communication standards.

- ⇒ Flexibility and extensibility.
- ⇒ Openness.

Please link to ACAP's FAQ <http://www.the-acap.org/faqs.php> for more information as well as to the publicly released project documents at <http://www.the-acap.org/project-documents.php> which demonstrate how ACAP can be used. We wish to emphasise that our use cases show the deployment of a form of DRM without the use of TPMs to enforce user permissions so that our readers can continue to enjoy our content freely.

*"2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?"*

EPC supports the principle of transparency as regards the use of TPMs. We consider that the most appropriate means and procedures to improve consumer information is through labelling and other similar methods which are agreed by voluntary means such as codes of conduct. Rightsholders should be free to deploy TPMs where appropriate within the framework enshrined in Article 6 of the Copyright Directive.

As regards the issue of data protection and TPMs, we have noted in the third of our 'Key Conclusions' that national laws must maintain a proper balance between the protection of privacy on the one hand with the enforcement of intellectual property rights on the other.

The legal framework to arrive at the balance exists under the Data Protection Directive, the E-Privacy Directive and provisions on data protection in the regulatory framework for electronic communications networks and services. We therefore welcome the Commission's support for 'Soft law' measures (e.g. Codes of Conduct) to encourage Member States to ensure that the proper balance is struck.

In that context, we support the undertaking by public authorities in the Memorandum of Understanding, otherwise known as the Accord Olivennes' that: *"This authority will also have, under the control of the judge, the ability to request technical providers (hosting services, access providers, etc.) to take any measures necessary to prevent or put an end to injury caused by the content of an online communication service."*

***3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?***

EPC welcomes and supports Recommendations, voluntary codes and similar measures which encourage adherence to the principles:-

- ⇒ EULAs should be written in simple, clear and non-technical language. They should therefore avoid complex legal terminology.
- ⇒ EULAs should be drawn to the user's attention in a prominent way.
- ⇒ The development of standard terms should be encouraged.

***4) Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?***

EPC would agree with this as a general proposition. Generally, ADR mechanisms offer a quicker, cheaper and more 'user friendly' way of settling consumer-related disputes.

ADR mechanisms may be binding (e.g. arbitration) or non-binding (e.g. mediation). Great care must be taken in regard to introduction of binding ADR mechanisms so as to ensure that they do not become additional media regulation "by the back door".

Although not developed for disputes relating to DRM, the ICANN and Nominet Domain Name Dispute Resolution Procedures are good precedents in the field of alternative dispute resolution.

***5) Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?***

We would agree with this as a general proposition. Non-discriminatory access is a vital ingredient in the development of nascent markets, such as that for digital content online, noting that remedies under both EU and national competition rules exist where SMEs are faced with anti-competitive practices.

## Multi-territory licensing

EPC wishes to stress the two fundamental principles which determine its members approach to the issue of licensing of rights:-

1. The freedom of publishers to choose the appropriate method of rights management.
2. The primacy of direct rights management in the digital space.

Accordingly, the starting point for EPC members is publisher-managed rights.

*6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?*

The answer to this issue depends on whether, as the Communication notes, *“the lack of multi-territory copyright licences makes it difficult for online services to benefit from the Internal Market potential.”*

EPC would make two preliminary observations about this question. First, we should make the point that any horizontal measure risks ignoring significant differences in how the exploitation and licensing of digital content works in different sectors of the media industry. Second, the debate about ‘multi-territory rights licensing’ has focused on the music industry and is principally about the difficulties in clearing rights via national collecting societies for pan European music services.

The Working Document notes that *“direct licensing of repertoire for online sales would also facilitate the multi-territorial management of rights as the repertoire licensed in this manner could be sold online across the entire Community.”*

As we have noted, direct licensing is the starting point for EPC members. In the publishing sector, the delivery of digital content services such as online newspapers, journals and increasingly e-books is a primary form of exploitation by the publisher and/or by their distributors through direct licences to the end user, whether under an online subscription, site licence or other direct contractual mechanism. In this scenario, multi-territory licences are not a problem. The contract between the publisher (or the distributor) and its customer/consumer will grant the contractually agreed rights. These may be on single site basis, a multi-site basis covering one or more territories, by platform or otherwise. This is likely to remain true as the market for digital content in the publishing industry continues to develop and mature. In this scenario, there are no significant barriers to obtaining multi-territory licences.

As regards the administration of secondary or subsidiary rights from publishers through collecting societies, most national collecting societies have reciprocal arrangements in place for paper with their counterparts in other territories and there are no significant barriers to obtaining multi-territory licences.

The issue of multi-platform licences is important here.

Direct digital rights rarely have geographical boundaries so direct licensing will deal with the multi-territory issues. Efficient licensing and access mechanisms will be key to meeting users' needs in the future.

*7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?*

Please see our answer in reply to Question 6.

*8) Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?*

There appears to be an underlying assumption to this question that there is an initial 'window', similar to the traditional windows of exploitation in the film industry, during which there is an initial 'sales surge', followed by the "Long Tail" of fewer sales over a longer period. This does not correspond to the business models being developed by publishers for the sale and delivery of digital content.

**Legal offers and piracy**

*9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?*

EPC considers that increasing cooperation between all stakeholders in the market for digital content online - from authors, producers, distributors and other intermediaries through to consumers and citizens - is to the benefit of everyone in developing this nascent market. In fact, it is an essential prerequisite for the realisation of the market's potential.

In this context, EPC welcomes collaborative initiatives such as the Principles For User Generated Content Services. These are collaboration between copyright owners and service providers as a set of good practice guidelines to serve as a benchmark for how to behave responsibly in the world of digital media content services.

ACAP is another example of a voluntary, cross-industry initiative.

EPC also welcomes the voluntary participation of consumer-representatives such as BEUC in these initiatives. Ultimately, everything which EPC members do is driven by the desire to meet customer demand.

10) Do you consider the [Memorandum of Understanding](#), recently adopted in France, as an example to followed?

We have already referred to the role of public authorities in the Memorandum of Understanding. EPC considers that the Agreement, signed on 23 November 2007, is a positive step in helping the market for content online to develop. EPC welcomes the fact that it was signed by the majority of French ISPs and telecom operators.

EPC endorses the preamble to the Memorandum which notes the strength of the content industries and internet access industries and concludes: *" These assets must not cancel each other out, but to the contrary complement each other, in the best interests of the consumer who will in this way have at his disposal powerful distribution networks and rich and diversified content."*

It is important to remember that the Memorandum was created to meet the concerns of the music and film industries. EPC wishes to stress the importance of avoiding a 'one size fits all' solution. Publishers have particular concerns about freedom of expression which must be fully addressed when crafting any similar agreement which might apply to the publishing industry.

The illegal exchange of illegal copies of copyright works via peer to peer software such as 'KaZaA' continues to cause enormous damage to the content industries and do have a negative impact on the development of legitimate business models. Addressing this problem is integral to the development of new business models and services.

In this regard, we note that at the heart of the Memorandum is a mechanism based on the principle of the legal responsibility of the subscriber for the fraudulent use of his subscription, and will be driven by a specialised public authority, placed under the control of a judge, in order to guarantee individual rights and liberties. This authority will be given the personnel and technical means to warn and to sanction.

The memorandum contains a number of useful pointers in that it recognises the need for all participants to play a role and that cross industry collaboration is important. Nevertheless, the EPC wishes to reiterate our statement above that the duties of ISPs and Telecoms operators in terms of cooperating with requests from rights holders to remove IP infringing material do not, and should never extend to monitoring or control over our editorial content online. This remains the preserve of the owners of that content and attempts to remove such content without a direct request to do so by the

original publisher would be in gross violation of the fundamental freedom of expression.

*11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?*

EPC members share the concerns of other rights holders about the use of networks for the illegal file sharing and other copyright infringing activities as this undermines general respect for copyright which goes against our long term economic interests and ambitions to develop online content services.

Technology to track and identify ownership of copyright works has a key role to play. In a networked, software-based world, it makes sense to use the technologies in a way which helps develop digital content services online. Technology-based tools also clearly have their place in preventing and detecting illegal copying and piracy, which remains a serious problem. YouTube, for example, has recently introduced filtering software which checks newly uploaded videos against a database of copyright protected content. The use of such tools by intermediaries such as YouTube clearly help to build confidence and trust with rights holders.

However, concerns about the detection and prevention of infringing activities on the network must be balanced with other concerns. EPC members, as publishers of newspapers, magazines and other information sources - online and offline - are vitally concerned to ensure that automated filtering measures do not become a form of 'de facto' censorship and thereby undermine fundamental freedoms, particularly that of freedom of expression.

When considering the application of filtering measures, we need to draw a clear distinction between (i) the use of such technological measures by rights holders or equipment manufacturers where they are embedded in files containing copyright content or in devices used to play them (e.g. personal computers) and (ii) the deployment of filtering measures on the networks. It is this latter form of use which raises significant concerns.

The Articles 12 to 15 of the eCommerce Directive establish a finely balanced hierarchy of liability for all those involved in the provision and dissemination of information society services. EPC has always supported this Directive and we would not wish to disturb its balance.

Access providers have a specific and particular role to play in the dissemination of news, information and other material which is the 'oxygen' of democratic societies, which puts them in a different position to that of hosts, search engines and other intermediaries. EPC notes that Article 15.1 of the E-Commerce Directive states that Member States cannot impose a general obligation on access providers actively to monitor the information they transmit. The use of filtering measures is on the other hand an *automated* means of monitoring. In the light of EPC's concern to safeguard fundamental

freedoms, we would not support any change to the principle enshrined in Article 15.1.

At the same time, Article 15 (2) of the E-Commerce Directive allows member states to establish obligations for access providers to inform promptly the competent public authorities of alleged illegal activities undertaken by users of their services.

Accordingly, the application of filtering measures must maintain and respect the balance reflected in Articles 15 (1) and 15 (2) as well as the provisions of articles 12-14. Great care must be taken in the application of filtering measures to ensure that they do not undermine these fundamental rights. They must respect the safeguards built into the existing framework which guarantee freedom of expression whilst providing rights holders with the necessary means to eliminate copyright abuses through illegal file sharing and other activities.

On behalf of the Members of the European Publishers Council  
29<sup>th</sup> February 2008

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