Final Report on the Content Online Platform

The online distribution of creative works such as music, films, video games and publishing content is transforming creative industries and driving the take-up of broadband based services in Europe and worldwide. This de-materialisation in the distribution of creative content is shaking up the business models of creative industries, with both potential opportunities and potential losses. It is also introducing new players into the media industries' landscape. By way of a response to these transformations, the European Commission launched the "Content Online in the Single Market" initiative. The Commission's aim is twofold: in the short term, to promote pragmatic solutions enhancing the availability of creative content online and ensuring additional revenues for all players in the value chain; in the medium term, to look at the need for regulatory intervention.

The Communication of 3 January 2008[1] created a stakeholders' discussion and cooperation platform, the so-called "Content Online Platform", which gathered 77 high-level experts from all groups involved (creators, rights holders, content providers, consumer associations, internet service providers and the telecommunication industry). Five meetings of the Content Online Platform, chaired by Commissioner for Information Society and the Media, Mrs Viviane Reding, took place in Brussels on different topics, with different participants depending on the topics:

- 17 April 2008: "New business models"
- 26 June 2008: "Legal offerings and piracy"
- 17 July 2008: "Management of copyright online"
- 14 October 2008: Follow-up on "Legal offerings and piracy"
- 21 January 2009: "Protection of Minors and Cultural Diversity"

The main findings and trends with respect to the relevant topics can be summarized as follows:

New business models / Improvement of availability of content / legal offers

There is a consensus among participants that creative content is a high-risk investment sector, in particular in Europe where the market is fragmented, whereas development and production of quality creative content is often very costly to produce[2].

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[1] http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm
[2] The average budget of a European feature film is between 3 and 4 m Euro. According to information from the International Software Federation of Europe (ISFE), commercial video game budgets for home consoles and PCs range from between 200.000 Euro for small handheld or PC games to up to 10-15 m Euro for large blockbuster games, developed over several formats simultaneously. The cost of developing a blockbuster massively multiplayer online game can be even greater.

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Due to the "prototype" business model widely applicable to creative content in Europe, it is difficult to attract risk capital for new online business models and it is difficult in the short term to finance the transition to digital distribution with the revenues of physical sales as these are shrinking for several types of content – this does not seem to apply to videogames, that were "born digital", nor to books whose physical sales remain stable and even increase in some markets.

A much debated question among the Platform participants was the possible monetisation of "user created content". Established business models of the traditional media companies are based on highly evolved approaches to advertising and subscription models - models which themselves are built upon the presumptions of both the ownership or control of intellectual property (i.e. content) and the ownership or control of expensive distribution networks (so that the content can reach the audience). New entrants in the media industry such as YouTube have exploited increasing demand for user-created content whereas the established, traditional media companies have taken longer to exploit these kinds of opportunities. The demand for user-created content is more about creating a "playing field" for visitors rather than creating material for them to consume. A parallel development can be seen in the video game industry where massively multiplayer online role-playing games (MMORPG) give the player a large amount of freedom and essential parts of the games are actually built by the players themselves.

Considering the huge differences in production budget according to the type of creative content, there is probably no "one size fits all" answer to this question. Whereas more and more business models integrate advertising revenues, most costly quality / premium content will certainly continue to be paid-content, either on "pay-per-consumption" or on subscription basis. In that respect, participants in the Platform agree that a considerable proportion of consumers are increasingly willing to pay for legal online offerings, notably live entertainment, and to accept limitations to the availability of content for free, provided it is priced accurately, and even to pay more for niche content This is the case with paying archive services of certain newspapers and certain video-on-demand services, for instance.

However, in a digital landscape marked by seamlessness (fixed-mobile convergence, mobile TV, mobile internet, multiplication of devices enabling creative content consumption), consumers expect easy access and cross-platform availability, including across borders. This is a particular challenge for cinematographic content where a scheme of release windows often applies, originating in the current financing model of the film industry (although it is worth noting that the film industry has started to foreshorten the release window scheme in order to favour video-on-demand). This also raises the question of copying restrictions for legally acquired content. On this last point, it is interesting to note that the heated debate on the use of technical protection measures seems to be behind us, with the acknowledgment that here as well there is no "one size fits all" answer: while Technical Protection Measures (TPMs) are less used for music, they remain essential for films. Other points made by the Platform and related to the move to seamlessness include the advantages of relying on open standards and the necessary debate on personal data made

available by consumers, both as regards the value of these data - giving personal information as a form of payment - and as regards privacy.

Management of copyright online

For creative industries, which are based on copyright, i.e. the right to monetise the consumption / reuse of the works they have produced, digital distribution poses interlocking challenges. These include loss of control of the copying process - beyond the pre-existing private copy model - due to the technical ease of making and disseminating digital copies, the steadily increasing capacity of communication networks and the widespread deep-linking of content enabled by search engines. This has caused disputes between newspaper publishers and search engines.

The shift towards "de-territorialisation" of content distribution merited special consideration. It responds to consumers' desire for seamlessness and to benefit from the opportunities that can arise from a unified content market. These challenges were taken up by participants' debate on current licensing mechanisms and their possible improvement.

As regards cross-border rights clearance, the situation appears to be confused: in the music sector, legal incentives, such as the 2005 Online Music Recommendation adopted by the European Commission[3], have not met with approval from all stakeholders. There is a need to reassess cross-border licensing in the music sector. This issue remains to be tackled in the audiovisual sector, where the potential of multi-territory licensing has been so far, for linguistic and cultural reasons, mainly applied on a regional or otherwise limited basis (Scandinavia, Baltic States). This move towards more multi-territorial licences should, according to some participants in the Platform, be supported by a European database for creative content that would help to identify rights holders and deliver all necessary information for licensing and rights management.

On the issue of cross-border licenses, the discussions within the Platform have shown the need to look at pragmatic solutions and to encourage their use. Thus, the Commission has mandated a study on multi-territory copyright licensing for audiovisual works, focusing on legal, economic and cultural aspects. This study is undertaking an analysis of the legal framework and licensing practices for online distribution of audiovisual works. It will also provide a detailed description of the structure of the online distribution sector and the relevant market in the EU Member States. The study will in addition analyse the main challenges for the development of a multi-territory distribution business model and its economic and cultural consequences. Looking beyond this study, whose final results should become

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[3] Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_276/l_27620051021en00540057.pdf)

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available by early 2010, the Commission's services intend to continue the debate in the course of 2009 by consulting all stakeholders, Members of the Parliament and Member States.

As mentioned previously, the question of the use of Digital Rights Management Systems (DRMs) and associated TPMs has only been a side issue in the Platform discussions, at a time when indeed a large part of the music sector is moving away from such systems. However, discussions confirmed that they remain necessary for the film industry in order to safeguard the possibility of a return on investment. Platform participants joined the wide consensus on the need that, in case DRMs / TPMs *are* used, consumers must know what they can do and what they cannot do with the content - copy restrictions etc. - and DRMs should be as interoperable as possible, allowing portability of content from one device to another.

Piracy

As regards the fight against piracy, there is no consensus on the remedies in view of the different visions of stakeholders regarding the future management of intellectual property rights in the digital age. Only the following points seemed to meet with majority agreement:
- the creation of legitimate, attractive and consumer-friendly offers is a necessary and systemic part of ensuring, in a sustainable way, respect for intellectual property rights in the digital age;
- stakeholders should better cooperate with each other to ensure respect for intellectual property rights;
- there should be more awareness-raising as to the importance of intellectual property rights and the consequences of "piracy" for the creative industries;
- the different approaches to tackling "piracy" emerging in the Member States were discussed, several of which integrate one or more features described above. Some participants pointed out that widely varying approaches in the Member States could make the development of succesful cross-border business models more difficult.

The Platform took note of a number of practical questions that need to be resolved in any case, whether new legislative approachs or self- or co-regulatory initiatives should be chosen in the future at national or EU level. This includes finding a workable solution as regards the identification of the "real" infringer, foreseeing a system to split costs between rights holders and ISPs, and making sure that decisions as to whether the use of the content is illicit or not are based on evidence. On this last point, the Platform debated the reliability of content recognition techniques such as "watermarking" and "fingerprinting", which allow identifying and retrieving content used illicitly, generally concluding that these are promising and useful instruments for the protection of intellectual property rights, with even a

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potential to help with the construction of monetisation models for content[4].The importance of common or compatible standards was underlined in this respect.

In summary, it appears to be difficult at this point in time to strike the right balance between all interests involved. It could be a mistake to see issues such as "piracy", access to content, DRM, private copying and levies as issues that require a "deal" between *two* camps only. A *third* camp is regularly missing in these debates: the consumer. A broader debate therefore appears to be needed on the future of intellectual property rights in a single online market for consumers.

Protection of Minors

Platform participants debated in particular the following topics: how to improve media and digital literacy, how to enhance parents' awareness as to the risks and existing protection tools, how to better share responsibility between all stakeholders, the advantages of co- and self-regulation versus regulation and the means to encourage more positive and appropriate content for minors.

There was a consensus among participants that technical solutions to protect minors in the online environment are available, notably "black lists" that are updated on a regular basis and indicate forbidden websites or websites which are deemed undesired by parents. However, one should look more at increasing "positive" offers for minors, to deflect their interest away from harmful content. There are also interesting examples of specific search engines specialised in suitable content for children, in Germany and in the Netherlands. More generally, this raises the question of content classification. Participants in the Platform agreed that the goal of a pan-European dimension appears very difficult, given the different moral and ethical sensibilities in the Member States. Video games are the exception, given that PEGI and PEGI Online do apply in the vast majority of Member States.

A specific focus of the Platform's discussions was on online games, and on so-called "casual" online games, which are mostly offered for free, have easy rules and a game-play that can be completed speedily. These characteristics make them particularly attractive for minors. Casual games are an interesting case where creative content developed by amateur or small-scale producers spreads much more quickly than co-regulatory initiatives aiming at protection of minors can realistically operate. In this specific case, the self-regulatory PEGI Online system - conceived for online games - faces in particular implementation difficulties in respect of casual games.

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[4] One operator of a video sharing website uses a system which can be summarized as the "track, monetise or block - approach": When confronted with the use of copyrighted content, the operator provides the rights holders with the necessary tools to identify their works. The rights holders can then decide if he wishes to monitor the use of the content, whether he wishes to make money out of his content at the video sharing website via advertising revenues or whether the content should simply be blocked from the service.

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Cultural Diversity

Does the multiplication of platforms lead to increased opportunities for cultural diversity in general and in particular European works? The opinion of the Platform's participants was split on this question. It seems to be a fair conclusion that it very much depends on the business model that will dominate content online distribution. Indeed, some participants argued that subscription-based online offerings would contribute better to cultural diversity than "pay-per-view" models because subscribers want to maximise their flat rate and therefore are more in search of "niche" content in addition to the mainstream one. Another element influencing the level of availability of European works is exclusivity versus non-exclusivity; however, there is no consensus on this point: while non-exclusivity may better contribute to the availability of European film heritage for a wide audience, exclusivity might better foster competition between platforms, which would benefit consumers and - in the long run – also cultural diversity. One can therefore conclude that non-exclusivity seems to have rather short-term effects and exclusivity rather indirect effects, with impacts in the middle and long term on cultural diversity. In any case, the availability of culturally diverse offers through sustainable business models primarily depends on consumers' interest and acceptance.

Conclusions

- The exchange of views among participants in the Platform has helped the Commission better understand how the position of the different players has evolved over the last two years and whether consensus-building is progressing as regards key issues such as licensing, fight against piracy, etc.

- The Platform's meetings also fostered the spreading of good practices among the players in the value-chain and enabled the Commission to better assess where business agreements can solve remaining problem and where some legal shortcomings or loopholes could be dealt with by public authorities, at national or EU level.

- The Commission is planning to adopt a Second Commission Communication on Creative Content in September/October 2009 further to summarize and analyse the findings and results of the Creative Content Online initiative, and to define a set of principles for action by stakeholders and public authorities and provide a continuing framework for discussions with stakeholders for the continuing promotion of creative content online in Europe.

- Publication of the study on multi-territory licensing of audiovisual content mentioned above is expected in early 2010.