

**Creative Content  
in a European Digital Single Market:  
Challenges for the Future**

**A Reflection Document  
of DG INFSO and DG MARKT**

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## TABLE OF CONTENTS

1.	Introduction.....	2
2.	The evolution of technology and content markets .....	3
2.1.	Music.....	4
2.2.	Publishing.....	6
2.3.	Audiovisual (Film, Video-on-Demand).....	7
2.4.	Video games.....	8
3.	Recent EU level initiatives.....	8
4.	The main challenges.....	9
4.1.	Consumer access .....	9
4.2.	Commercial users' access .....	10
4.3.	Protection of rightholders.....	13
5.	Possible EU actions for a Single Market for Creative Content Online.....	14
5.1.	Consumer access .....	14
5.2.	Commercial users' access .....	15
5.3.	Protection of rightholders.....	19
6.	Conclusions .....	20

*"It will be my key priority to work, in cooperation with other Commissioners, on a simple, consumer-friendly legal framework for accessing digital content in Europe's single market, while ensuring at the same time fair remuneration of creators. Digital Europe can only be built with content creators on board; and with the generation of digital natives as interested users and innovative consumers."*

Viviane Reding, EU Commissioner for Information Society and Media<sup>1</sup>

*"The protection of intellectual and industrial property -- copyrights, patents, trademarks or designs -- is at the heart of a knowledge-based economy and central to improving Europe's competitiveness. This is a priority for reform: grounded on sound economics, not just legal concepts, and concentrating on solutions that foster innovation and investment in real life."*

Charlie McCreevy, EU Commissioner for the Internal Market<sup>2</sup>

## 1. INTRODUCTION

Copyright is the basis for creativity. It is one of the cornerstones of Europe's cultural heritage, and of a culturally diverse and economically vibrant creative content sector. In Europe, the cultural and creative sectors (from published content such as books, newspapers and magazines via musical works and sound recordings, to films, video on demand and video games) generates a turnover of more than €650 billion annually, contributes to 2.6% of the EU's GDP and employs more than 3% of the EU work force.<sup>3</sup> European Policymakers therefore have the responsibility to protect copyright, including in an evolving economic and technological environment.

At the same time, the growing importance of the Internet and of digitisation technologies is opening up new possibilities for distributing creative content online. This technological development opens the door for consumers to access to creative content online wherever they are and wherever they go in the EU's internal market. The availability of high quality creative content can be a key driver in the take-up of new technologies, in particular broadband internet, digital television and mobile communication. The convergence between content sectors and new communications technologies is blurring boundaries between previously distinct markets. New technologies can bring content to new audiences. The online distribution of creative content in the EU has the potential to create more choice and diversity for consumers, new business models for commercial users and more sustainable growth for rightholders.

The digital "dematerialisation" of content presents great opportunities for Europe, but also a number of challenges. First of all, within the internal market, obstacles still stand in the way of the free movement of creative people, cultural activities and in particular of the digital distribution of products and services, as already noted by the Council in May 2007.<sup>4</sup> In addition, illegal downloads on a large scale can jeopardize the development of an economically viable single market for digital content; it is therefore essential that legal offers

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<sup>1</sup> Speech of 9 July 2009, "Digital Europe – Europe's Fast Track to Economic Recovery".

<sup>2</sup> Speech of 21 November 2006 at the European Parliament's Committee on Legal Affairs.

<sup>3</sup> KEA European Affairs, Study on the economy of culture in Europe, 2006.

<sup>4</sup> Council Conclusions of 8 May 2007 on the contribution of the cultural and creative sectors to the achievement of the Lisbon objectives.

can evolve to allow consumers access on a cross-border basis. Furthermore, as content markets shift and merge, vigilance is needed to ensure that competition remains effective. Since the internet by definition allows access to content and services irrespective of geographic location, and since global competition for attractive creative content is fierce, responses to most of these challenges will have to be joint European ones, instead of being the result of separate or even contradictory national initiatives. Otherwise, not only does Europe risk losing out in global competitiveness, but also seeing the cultural base of the European project weakened.

In the present paper, the services of the European Commission would like to start a reflection and broad debate about the possible European responses to these challenges. The next European Commission will have the task to develop a new strategy for growth and jobs and to re-invigorate the single market project. In this context, Commission President-elect José Manuel Barroso called, in his Policy Guidelines presented to the European Parliament in September 2009, for an ambitious **European Digital Agenda** which should include **targeted legislative action**. The starting point of this reflection paper is therefore the objective of creating in Europe **a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online**, in particular by:

- creating a favourable environment in the digital world for creators and rightholders, by ensuring appropriate remuneration for their creative works, as well as for a culturally diverse European market;
- encouraging the provision of attractive legal offers to consumers with transparent pricing and terms of use, thereby facilitating users' access to a wide range of content through digital networks anywhere and at any time;
- promoting a level playing field for new business models and innovative solutions for the distribution of creative content.

As part of the ongoing discussions on the priorities for the European Digital Agenda, and adding to similar debates currently taking place at national level<sup>5</sup>, the Commission services now wish to focus the debate on practical solutions to encourage new business models, promote industry initiatives and innovative solutions, as well as on the possible need to harmonise, update or review legislation. The following reflections are meant to trigger an open debate among stakeholders. The input to this debate will be taken into account by the Commission services in the preparation of the legislative programme for the next Commission.

## 2. THE EVOLUTION OF TECHNOLOGY AND CONTENT MARKETS

Digital technologies bring a number of changes to the way creative content is created, exploited and distributed. New content is being created by traditional players such as authors, producers, publishers; but **user-created content**<sup>6</sup> is playing a new and important role, alongside **professionally produced content**. The co-existence of these two types of content

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<sup>5</sup> See the recent reflections started by the "mission Zelnic" in France.

<sup>6</sup> User-created content is defined as content made publicly available through telecommunication networks, which reflects a certain amount of creative efforts, and is created outside of the professional practices.

needs a framework designed to guarantee both freedom of expression and an appropriate remuneration for professional creators, who continue to play an essential role for cultural diversity.

As far as rights management, exploitation and distribution are concerned, traditional practices for licensing rights are not always adapted to digital distribution. Digital technologies bring new actors and new roles into the value chain. Previously separate services are converging, thus radically changing conditions for the distribution of creative content, bringing in its wake the integration of mobile operators, internet service providers (ISPs), telecom companies, broadband technology companies, websites, online shops, online rights aggregators and social networking platforms.

Making professionally produced creative content available online is proving to be a high-risk business, because of market fragmentation, high development and production costs and the need to fund as yet unprofitable new services from the declining revenue streams of "traditional" analogue and physical distribution. Different trends and considerable challenges arise depending on the type of digital content.

## 2.1. Music

Stakeholder consultations reveal that the **online dissemination of music**, with its multiple layers of ownership (authors and composers own the rights in their composition or the song, sound recording producers and performers own the "neighbouring rights" attached to a sound recording), causes the biggest challenges with respect to online licensing. Within the music industry, different rightholders own different rights. These different rights are typically managed by different collective rights management organisations (CMOs).

**Rights of authors** are administered by authors' societies on behalf of the authors and music publishers. Authors hold the rights in the composition of the lyrics/music, which include the following:

- Right of reproduction<sup>7</sup> i.e. the right to reproduce the work by making physical or intangible copies<sup>8</sup>. Physical copies are those incorporated or fixed in a tangible object, e.g. CD pressing. Intangible (digital) copies include those made by digital means e.g. upload, download, transmission in a network or storage on hard disk;
- Right to communicate the work to the public including making available interactively to the public<sup>9</sup> i.e. transmission of the work by playing recorded music in public or live, via a broadcast or on public premises, or by internet streams or downloads.

**Rights of performers, and record producers** (record labels) are related rights of producers and performing artists which allow them to control or obtain remuneration for the use of a sound recording. Such use includes making physical and intangible copies, broadcasting, but

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<sup>7</sup> Article 2 of Directive 2001/29 of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10, hereafter the "copyright in the information society Directive".

<sup>8</sup> In practice, the right of reproduction is divided between non-mechanical (right to print sheet music) and mechanical (right to reproduce for uses other than sheet music) reproduction rights.

<sup>9</sup> Article 3(1) of the Copyright in the Information Society Directive.

now also includes certain uses related to Internet activity such as on demand streaming and downloading. The rights include the following:

- For performers: the right to reproduce the fixation of a performance, to broadcast and communicate it to the public and to make the fixation of the performance available interactively<sup>10</sup>. The rights of communication to the public<sup>11</sup> and broadcasting are administered by CMOs representing performers or by CMOs jointly representing performers and record producers; the reproduction right and right to make available interactively is usually transferred to the record producers who manage it individually.
- For record producers: the right to reproduce, to broadcast and to communicate to the public the sound recordings and to make them available interactively<sup>12</sup>. The rights of communication to the public and broadcasting are managed by CMOs representing record producers or by CMOs jointly representing performers and record producers. The record producers' reproduction right and right to make available interactively are administered individually by record producers.

The licensing of musical compositions and of sound recordings is further complicated by the fact that most online forms of dissemination require the simultaneous clearance of the digital reproduction right and the "making available" right. In fact, the long-standing contractual practice inherited from traditional broadcasting and brick and mortar distribution is to divide the rights between the mechanical reproduction rights (CDs) and performing rights (broadcasting). The advent of the Internet has prompted new channels of digital distribution, but the contractual divide remains<sup>13</sup>. As a result, these two sets of rights have to be cleared, as opposed to clearing a single "making available" right.

All rightholders in a musical composition or a sound recording participate to widely varying degrees in the proceeds from the licensing of these rights.

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<sup>10</sup> Reproduction right: Article 2(b) of the Copyright in the Information Society Directive; right to equitable remuneration for broadcasting and communication to the public: Article 8(2) of Directive 2006/115 of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, p. 28 (hereafter "Rental and Lending Directive"; making available right: Article 3(2)(a) of the Copyright in the Information Society Directive.

<sup>11</sup> The right of communication to the public of performers does not cover non-interactive streaming activities. For such activities, performers rely on their reproduction right for remuneration. The same applies to the right of communication to the public of record producers.

<sup>12</sup> Reproduction right: Article 2(c) of the Copyright in the Information Society Directive; right to equitable remuneration for broadcasting and communication to the public: Article 8(2) of the Rental and Lending Directive; making available right: Article 3(2)(b) of the Copyright in the Information Society Directive.

<sup>13</sup> For example, an author writing a song 40 years ago transfers his right of communication to the public to a collecting society, and his reproduction right to his publisher. The contract may be for the whole term of protection, e.g. until 70 years after the death of the author. As digital distribution will require some form of reproduction (on a server, a browser, a personal music player) as well as of communication to the public, the author cannot transfer a unitary "making available" right to the publisher or to a collecting society. The right has been broken up contractually and its components have already been transferred under the existing contract.

Another reason why markets in online music remain nascent is the complex and territory-based management of public performances by CMOs<sup>14</sup>. Collective rights management is common with respect to public performance rights (which are required for any interactive 'making available') in the music sector. The traditional licensing structure employed by CMOs is still in a process of adaptation to the ubiquity of the internet: while books and films can more easily be licensed in the geographical area chosen by either the publisher or film producer, the public performances of musical works are licensed on a strictly national basis. Recent efforts to create multi-territorial licensing for musical works has led to European licensing platforms<sup>15</sup>, albeit limited to the digital reproduction rights involved in online dissemination. As far as the public performance rights are concerned, collective rights management remains local. This split between international licensing of digital reproductions and national licensing of public performances (making available) has, it is argued, led to a further complication in online licensing practices.

Only time will tell how collective licensing practices with respect to performance rights will change in the wake of the antitrust decision in *International Confederation of Societies of Authors and Composers (CISAC)*<sup>16</sup>; legislative intervention might become necessary.

## 2.2. Publishing

The **online distribution of in-print books** is – compared to music – a more straightforward matter, as the publisher or the author owns the right to make the book available online<sup>17</sup>. More complex issues arise with respect to the mass digitisation of out-of-print books or orphan books. In the latter case, the owner of the "digital" rights is unknown. This complicates the licensing process for mass- digitisation efforts.

**Online distribution of literary works and e-books** is still a nascent market. Commercial projects are being developed outside Europe, without necessarily complying with EU copyright rules. From a European perspective, the rights of authors and publishers should be duly protected and secured when their works are digitised and made available through online services. This does not contradict the important public policy objective of ensuring public access to those works via digital libraries and archives, provided that the right legislative and regulatory framework is in place and licensing models are adequate for achieving a Digital Single Market without borders for rightholders and the consumer.

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<sup>14</sup> According to the Commission's survey, available at: [http://ec.europa.eu/internal\\_market/copyright/docs/management/study-collectivemgmt\\_en.pdf\(2005\)](http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf(2005)), there were 152 collective rights management societies active managing music rights in the EU (2003), acting on behalf of approximately 1.6 million right-holders and managing €4.9 billion of royalties per year. Out of this revenue collected, €3.8 billion was distributed. Cross-border distribution of royalties within the EU amounted to €322 million, whereas distribution to third countries outside the EU amounted to €184 million. 80% of the revenue generated with collective rights management arises from the exploitation of musical works and is generated by the top ten societies that are active in this field.

<sup>15</sup> CELAS, PEDL, ARMONIA, DEAL (SACEM-UMPG), Alliance Digital, etc.

<sup>16</sup> Commission Decision COMP/C2/38.698 - CISAC of 16 July 2008, available at [http://ec.europa.eu/competition/antitrust/cases/index/by\\_nr\\_77.html](http://ec.europa.eu/competition/antitrust/cases/index/by_nr_77.html).

<sup>17</sup> Who of the author or publisher owns the making available right depends on the drafting and interpretation of publishing contracts (or other contracts such as contracts under which journalists' services are employed). Interpretation of contracts and in particular copyright contracts varies from one Member State to another. In some countries (e.g., France, Germany), interpretation rules specific to copyright contracts apply; in others (e.g., the U.K.), general contract rules apply.

**Digitisation of books and other literary and artistic works** under the *Europeana* project<sup>18</sup> is a significant development. However, there is also a risk that a considerable proportion of the books in Europe's national libraries cannot be incorporated into mass-scale digitisation and heritage preservation efforts such as *Europeana* or similar projects for rights clearance reasons, since their rightholders cannot be identified (orphan works) or must expressly consent (out-of-print works). The issue of orphan works was addressed in a broader concept at EU level in instruments such as the *Commission Recommendation 2006/585/EC*<sup>19</sup>, the *2008 Memorandum of Understanding on Orphan Works*<sup>20</sup>, *Green Paper on copyright in the knowledge economy*<sup>21</sup>, *Communication* and the *Public Consultation on "Europeana – Next Steps"*<sup>22</sup> and related diligent search guidelines. However, developments in other parts of the world indicate that Europe, and the European way of protecting copyright, could come under substantial competitive pressure if European solutions which ensure legal certainty and a digital level playing field throughout the 27 EU Member States are not rapidly developed. The recent *Communication on Copyright in the Knowledge Economy*<sup>23</sup> points to ways to find viable solutions for simple and cost-efficient rights clearance covering mass-scale digitisation and the online dissemination of library collections still protected by copyright. The *Communication* also announces that the Commission will carry out an impact assessment on possible EU-wide solutions to facilitate the digitisation and dissemination of orphan works.

### 2.3. Audiovisual (Film, Video-on-Demand)

The situation in relation to the audiovisual sector is significantly different. On the one hand, it appears more complex. There are many more rightholders involved in the creation of a film: director, producer, actors, screenplay and music soundtrack authors, to mention but a few. In addition, the rights of performers (actors) are not fully harmonised at European level, so that actors enjoy different rights in different Member States<sup>24</sup>. On the other hand, this complexity is partly mitigated by the role played by the film producer as a central rights clearing point. The film producer usually benefits from a transfer of rights from the creators involved in the film<sup>25</sup>, which means he can then license a significant bundle of different rights together. As a result, collective management plays a less important part, although it is still required for soundtrack music and private copying levies; and in some Member States, depending on legislation and collective bargaining agreements<sup>26</sup>, for rights of some creators and for certain rights such as rental and lending rights<sup>27</sup>.

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<sup>18</sup> <http://www.europeana.eu>

<sup>19</sup> Commission Recommendation 2006/585/EC on the digitisation and online accessibility of cultural material and digital preservation

<sup>20</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/mou.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf)

<sup>21</sup> COM(2008) 466/3,

[http://ec.europa.eu/internal\\_market/copyright/copyright-infso/copyright-infso\\_en.htm#greenpaper](http://ec.europa.eu/internal_market/copyright/copyright-infso/copyright-infso_en.htm#greenpaper).

<sup>22</sup> [http://ec.europa.eu/information\\_society/newsroom/cf/itemlongdetail.cfm?item\\_id=5181](http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=5181)

<sup>23</sup> COM(2009) 532, [http://ec.europa.eu/internal\\_market/copyright/docs/copyright-infso/20091019\\_532\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf).

<sup>24</sup> I.e. performers acting in audiovisual works enjoy the right of interactive making available under Article 3 (2) of the Copyright in the Information Society Directive. They do not enjoy a right of communication to the public under Article 3(1) of the Copyright in the Information Society Directive; and they do not enjoy a right to single equitable remuneration from broadcasting and communication to the public under Article 8 of the Rental and Lending Directive.

<sup>25</sup> As recognised under Articles 3(4) to 3(6) and Recital 15 of the Rental and Lending Directive.

<sup>26</sup> These may for instance provide for certain payments for TV re-runs.

<sup>27</sup> E.g. for performers, remuneration for the rental right is sometimes collected by collecting societies, for instance in the Czech Republic, Spain and Germany.



In addition, in the audiovisual sector, switching to new video-on-demand (VOD) services involves several challenges.

Statutory and contractual provisions relating to **release windows** for VOD can act as a barrier to the availability of content on digital platforms across borders, because of the time lapse between VOD and other releases. Release windows that are too long can hinder the emergence of attractive legal offers and stifle innovation.

Online platforms do not generally contribute to financing the production of films and other audiovisual works in the same way as "traditional" distributors, in particular upstream investment, e.g. pre-purchase of rights; online platforms do not yet play the important role that cinema exhibitors do in the promotion of films.

Together with the other "traditional" ways of financing, based on release windows and funding possibilities only in the country of production or countries of co-production, the audiovisual market in the EU remains territorially partitioned.

#### 2.4. Video games

**The video games industry** was born digital and relies to a large extent upon online interactivity. This is why it remains one of the most consistent online audiovisual markets, and less subject to cultural and linguistic differences. Thus many consumers across Europe can enjoy video games regardless of their language and country. To a certain extent, the Digital Single Market is already a reality when it comes to video games.

### 3. RECENT EU LEVEL INITIATIVES

There have been a number of actions at European level since the Commission's *2008 Communication on Creative Content Online in the Single Market*<sup>28</sup>. The controversies that have often surrounded these initiatives highlight the need for adequate solutions and the difficulties of designing and implementing them.

The 2008 Communication created a stakeholders' discussion and cooperation platform, the "Content Online Platform", which gathered 77 high-level experts from all groups involved: creators, rightholders, content providers, consumer associations, ISPs, broadcasters and the telecommunication industry. The *Final Report on the Content Online Platform* was published on 12 May 2009<sup>29</sup>. It summarises discussions on new business models, legal offerings and piracy, management of copyright online, protection of minors and cultural diversity.

Competition rules applied by the Commission in its *CISAC (International Confederation of Societies of Authors and Composers) decision*<sup>30</sup> are prompting the players involved in music licensing to reorganise their licensing practices. In particular, the decision aims to promote competition and pan-European licensing, by ending the practice whereby each national CMO has the exclusive right to license the world repertoire to commercial users located in their territory.

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<sup>28</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0836:EN:NOT>

<sup>29</sup> [http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_platform\\_report.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_platform_report.pdf)

<sup>30</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1165&guiLanguage=en>

In the context of the *Online Commerce Roundtable*<sup>31</sup> participants in digital music distribution are discussing solutions to overcome territorial restrictions in the licensing of musical works. Some rightholders, e.g. SACEM, have started to indicate their willingness to allow other CMOs to license their repertoire on a non-exclusive and pan-European basis.

The Commission has also commissioned a study to assess options relating to the licensing of audiovisual works, including the option of creating an EU-wide or multi-territory licence, in addition to the one for the territory – or territories – where the audiovisual work was (co)produced. The final study will be available in early 2010. First findings indicate that legislative innovations appear necessary in order for rightholders, content distributors and consumers to benefit fully from the transition from an analogue to a digital world.

Finally, the Commission recently adopted a Communication on Copyright in the Knowledge Economy which aims to tackle the important cultural and legal challenges of mass-scale digitisation and dissemination of books, in particular of European library collections.

#### **4. THE MAIN CHALLENGES**

New online services require a more dynamic and flexible framework in which they can legally offer diverse, attractive and affordable content to consumers – which is in many instances an important part of the response to widespread illegal downloads. To this end, the challenges faced by the three main groups in the value chain – consumers, commercial users and rightholders require careful analysis. Only a full understanding of their respective interests will allow the development of the future of online content markets in the EU.

At the outset, consumers want access to a wide choice of content any time and at any place within the EU. Commercial users need easier and quicker rights clearance structures so that they can obtain rights for diverse creative content from all around the world and offer it throughout Europe on digital networks. Rightholders want to ensure that they are remunerated fairly and adequately when their works are used on digital platforms.

##### **4.1. Consumer access**

Consumer confusion and frustration is compounded by the fact that business models, statutory rules and contractual relations between the parties differ fundamentally between content sectors and across the 27 EU Member States, contributing to the complexity and the limited attraction of the legal offer for online content in Europe.

Both the Commission and Members of the European Parliament frequently receive letters, information requests and complaints from European citizens asking why audiovisual media services (including sport events) are available in some territories and not in others, while reception is technically possible<sup>32</sup>. Efforts by consumers to circumvent territorial restrictions of transmission rights and the growing grey market for devices used for that purpose suggest that there is a demand for multi-territory distribution of audiovisual media services.

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<sup>31</sup> [http://ec.europa.eu/competition/sectors/media/online\\_commerce.html](http://ec.europa.eu/competition/sectors/media/online_commerce.html)

<sup>32</sup> E.g. the petitions to the European Parliament of Mr Agustin Campos Flores (no 1817/2008), and of Mr Klaus Schäfer 1179/2008.

Consumers wish to access creative content on any media platform and in a way which allows them to choose the time when they view, read or listen to that content. This applies to audiovisual media services, radio and other online services, regardless of whether these are provided at national or European level. In the digital age, citizens want to access the same content on different platforms or across borders and should expect to be able to do so without impediment.

Moreover, **user-created content and interactive services** are having an increasing social, cultural and economic impact on content industries. Consumers expect more freedom and flexibility to express themselves on these platforms. They also want to be clearly informed whether their activities are compatible with third party copyright and under what conditions they could derive commercial revenues from their own creations. Again, the Commission and Members of the European Parliament frequently receive information requests and complaints from European citizens asking how they can comply with copyright rules in uploading user-generated content on the internet. European citizens who are willing to comply with copyright rules are often bewildered by the complexity of the response.

Consumers enjoy social networks, so-called "feels-like-free" services and advertising supported services by which they can access creative content without any payment. However, they are also concerned about the treatment of their **personal data** so that it is not compromised or traded by private companies, and left unprotected against electronic fraud and spam.<sup>33</sup>

#### 4.2. Commercial users' access

Despite the absence of technical barriers to the circulation of content online, **territorial licensing** is prevalent with respect to some rights (performance rights) in some sectors (music) in Europe. In those sectors, the multitude of rights and rightholders to be administered causes complexity in the licensing of digital content, blocking commercial users' access to a wider choice of content.

Territorial restrictions for the use of creative content are often the result of commercial decisions by rightholders and providers of audiovisual media services, even though creators often grant worldwide rights to their publishers, collecting societies or producers.

Copyright law is territorial. Traditionally this means that states grant and recognise copyright in their own territory via their national legal order. In the context of European integration, the traditional territoriality of copyright has come increasingly into conflict with the imperatives of a borderless single market, created by a supranational legal order. For the moment, in the EU, the author of a single work will enjoy a separate copyright in that work in each of the 27 Member States to the EU. This brings with it the right to prevent a work from being marketed in one Member State, while authorising it in others. As a consequence, today, rights in several Member States will come into play when protected works or other subject matter are traded or otherwise disseminated across national borders.

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<sup>33</sup> According to the new Eurobarometer survey on "Consumer Confidence in the Information Society", although a third of consumers would consider buying online from another country, only 7% actually do so. The survey is available at: [http://ec.europa.eu/information\\_society/policy/nis/strategy/activities/index\\_en.htm](http://ec.europa.eu/information_society/policy/nis/strategy/activities/index_en.htm)

The territoriality of copyright is mitigated, in the EU, by the doctrine of exhaustion as developed by the European Court of Justice and codified in secondary legislation. This prohibits the owner of an intellectual property right from exercising any control over the resale, import or export of any goods which have been placed on the market with his consent. Thus when a tangible product enshrines a copyright protected work, such as a music CD, the principle of exhaustion applies: the owner of, for instance, the French copyright may not prevent the import in France of a CD lawfully marketed in Germany<sup>34</sup>.

However, the principle of exhaustion only applies to *tangible* goods sold in the EU. This excludes "performance copyright" in films, where the right of a copyright owner and his assignees to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work. In its *Coditel I* (or *Le Boucher*)<sup>35</sup> decision, the ECJ refused, on the basis of the existing state of copyright legislation, to recognise a rule of Community exhaustion in respect of acts of secondary cable transmission. The Court based this on a fundamental distinction between the broadcasting or public performance of films and the circulating of physical copies of a film. In relation to the broadcasting or performance rights, the Court held that the owner of the rights in a film had a legitimate interest in receiving fees on the basis of the number of repeat performances of the film. Owners of films can therefore continue to license their rights territorially under the present state of Community law. Only legislation could change this state of the law.

In addition, while the distribution right is subject to the exhaustion principle, the digital transmission of protected works and other subject matter is not covered by the distribution right. Electronic delivery of works or other subject matter is therefore not akin to the supply or delivery of a good. This is further confirmed by Recital 29 of the Copyright in the Information Society Directive which provides that: "*the question of exhaustion does not arise in the case of services and online services in particular. ... Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides*". This means that for example music download services need to obtain authorisation in each Member State if they wish to offer their services in all Member States.

The legislative approach to exhaustion began with the introduction of the rental right in the 1992 Rental and Lending Directive (codified in 2006)<sup>36</sup>. The rental right is not exhausted by any sale or other act of distribution of originals and copies of videos or DVDs which incorporate copyright works<sup>37</sup>. In this instance, the Community legislator applied the non-exhaustion principle to tangible goods, because the rental of tangible objects is a service. In addition, Directive 96/9/EC of 11 March 1996 on the legal protection of databases<sup>38</sup> describes the supply of on-line databases as coming within the field of provision of services (recital 33). For the *sui generis* right, recital 43 provides that the right to prohibit reutilisation is not exhausted in the case of on-line transmission.

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<sup>34</sup> Article 4, Copyright in the Information Society Directive.

<sup>35</sup> Case 62/79 [1980] E.C.R. 881.

<sup>36</sup> Prior to Directive 2006/155 on Rental and Lending Rights, computer programmes were recognised as the subject of a rental right, which is not exhausted by the first sale of a copy of the computer programme: Article 4(c), Directive 91/250 of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17.5.1991, p. 42.

<sup>37</sup> Article 1(2) of the Rental and Lending Directive.

<sup>38</sup> Official Journal L 77 of 27/03/1996

In addition, the digital reproduction right, which covers temporary copies i.e. transient<sup>39</sup> or stored copies produced by any means and in any form, is not subject to exhaustion.

Fragmentation of the single market by copyright is thus inherent in the current state of Community law where there are still 27 national copyright systems, instead of a single European Copyright Law. This can lead to additional rights management costs, and also to a situation where consumers often are prevented from online access to content available in another Member State. Nevertheless, it is worth emphasising that the present legal framework does not in itself prevent rightholders from commercialising their works on a multi-territory basis. The problem lies more on the side of commercial and contractual practice which is based on the existing fragmentation of copyright legislation in the EU.

Alternative legislative approaches have been implemented, for instance under the 1993 Satellite and Cable Directive<sup>40</sup>. This Directive provides that for a satellite broadcast, the relevant copyright act is the uplink to the satellite, and not the reception of the broadcast in all the Member States within the satellite's footprint; and that, in order to avoid programming black-outs, the rights in a simultaneous cable retransmission of a programme originating in another Member States are managed collectively. As a result, a satellite broadcaster must only clear rights once, in the country of emission, and is dispensed with clearing the rights again in each country of reception. The Satellite and Cable Directive, the adoption of which initially followed after the Television without Frontiers Directive of 1989, was never modernised, even though its "sister Directive" was updated twice (in 1997 and in 2007), in the latter case to cover the online delivery of audiovisual content. A similar reform of the Satellite and Cable Directive was called for by the European Parliament in 2004<sup>41</sup>, but so far not taken up by the European Commission. Technological developments are such that the current impact of the Satellite and Cable Directive, which was last evaluated in 2002<sup>42</sup>, remains unclear.

Efficient clearance of relevant rights for online exploitation is the key issue for commercial users. **In the music sector**, collective rights management organisations (CMOs) play an important role in licensing the relevant rights for online services. However, the highly **fragmented structure of the market** hinders the development of broader, more innovative and more attractive legal offers<sup>43</sup>.

In the **audiovisual sector**, the situation is both more complex and more heterogeneous from one Member State to the other. Generally, film producers obtain a transfer of copyright from the authors and performers who contribute to a film. The scope of rights granted to the

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<sup>39</sup> Certain transient system copies are exempted from the scope of the reproduction right in Article 5(1) of the Copyright in the Information Society Directive. The aim of this exception is to allow the transmission along networks between third parties by an intermediary (Internet service providers).

<sup>40</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15, hereafter the "Satellite and Cable Directive".

<sup>41</sup> Report on Television without Frontiers (2003/2033(INI)) Committee on Culture, Youth, Education, the Media and Sport by rapporteur Roy Perry available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2003-0251+0+DOC+PDF+V0/EN>

<sup>42</sup> Report from the Commission Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ( COM/2002/0430 final).

<sup>43</sup> Most CMOs are organised territorially; those that offer pan-European licences do so only for a limited repertoire. The need to acquire different types of rights from different classes of right holders offers still further scope for fragmentation.

producer under the transfer varies from one Member State to the other. In addition, it does not usually include the soundtrack music, which is licensed separately. Film producers are in a position to license individually the rights they own in the films. But collective management also plays a part for instance for private copying levies or in some cases for the rental and lending of videos, for the licensing of the soundtrack music, and in some cases, depending on collective agreements, to remunerate authors and performers for certain uses. Generally speaking, commercial decisions by rightholders have led to a partitioning of the market, causing some content, services or particular language versions of a work to be inaccessible from some Member States. Pan-European availability of audiovisual content, such as VOD services, is hindered by nationally-determined release windows that prevent simultaneous availability across the EU.

### 4.3. Protection of rightholders

Rightholders in creative content, such as authors, performers, producers of audiovisual works, phonogram producers and publishers wish to run their businesses by way of negotiations over which they have a sufficient degree of control. They wish to keep their contractual freedom and commercial relations with distributors in order to make the most economically viable decisions. As they still need to discover the best ways to commercialise their works on new digital networks, they are acting cautiously.

Publishers would like to be able to choose the most efficient way to exploit their creative content. For music publishing companies, this sometimes means having the autonomy to choose the most efficient collecting society for a certain repertoire in a selected geographical area. However, they also want the ability to license and/or manage rights individually without the intermediate role played by collecting societies.

Territorial restriction of the services provided by collecting societies historically derives from linguistic differences and the diverse advertising models used in individual territories to maximise the commercial value of the broadcasting rights.

The "**traditional**" ways of financing film production through box office, television rights and packaged media have led rightholders to partition the market for audiovisual content in the EU. For major foreign producers who generally hold the rights for the whole of the EU and have their films distributed in all or most of the Member States, **territorialisation is a way to maximise revenue**. For most European rightholders, exclusive rights are licensed for all distribution channels at the pre-production stage in the country of production or the countries of co-production in exchange for pre-financing. Rights are not sold in other countries where there is insufficient *a priori* demand on a territory-by-territory basis. European rightholders thus fail to gain the full benefit of the European market, while consumers are deprived of a potential source of choice and diversity. There are nonetheless strong signs that consumers are willing to discover new content from more diverse sources, as long as they are offered language options and a range of choices that takes account of their preferences.

**Collective management** of rights plays a different role depending on the content sector and the rights in question. Collective management is, as mentioned above, particularly widespread in the licensing of musical compositions. Likewise, in the publishing sector, collective management of secondary acts of exploitation, like reprography, is a common practice. Levies for private copying, where applicable, are always managed collectively. On the other hand, collective management is less used for audiovisual works, apart from certain types of

remuneration generated by private copying exceptions and cable retransmission rights in particular.

One of the essential issues in collective rights management is the relationship between individual authors or performers and the CMO. When a right holder joins a CMO, his relationship is governed by the contract that he enters into with that CMO and the CMO's statutory provision on membership ("by-laws"). The rightholders' works form part of the repertoire of that CMO. Rightholders who own the relevant copyright (although they may not have been involved in the creation or production of a copyright work<sup>44</sup>) make up the membership of collecting societies. CMOs negotiate the level of remuneration with users and manage the commercial exploitation of copyright and related rights and deduct a fee for the provision of these management services. But most CMOs in Europe also provide other services that are not linked to the management of copyright, such as collective bargaining, social and cultural, promotional and funding activities.

In the music sector, technical progress enables all rightholders and in particular authors and performers to manage certain rights individually without the intermediary of a music company or collecting society. However, even if CMOs in general support the development of online rights and endeavour to adapt their licensing schemes accordingly, the prevalence of traditional licensing approaches may sometimes contradict the interests of commercial users and ultimately limit consumers' ability to access creative content in a more convenient way.

## 5. POSSIBLE EU ACTIONS FOR A SINGLE MARKET FOR CREATIVE CONTENT ONLINE

On the basis of the results of the 2008 public consultation on creative content online and the discussions within the Content Online Platform, the Commission services have now identified a number of possible actions to address the challenges outlined above. These possible actions take different forms according to the needs of the relevant parties.

### 5.1. Consumer access

A wide and competitive Digital Content Market consisting of legal services, attractive offers and fair conditions would raise consumer confidence in online businesses and foster access to culture and knowledge across the EU.

- **Extended collective licensing** whereby a rights manager is deemed to represent "outsiders" – rightholders not formally members of the clearing system – in respect of certain forms of digitisation and online usage could create easier access to creative content for consumers. It is therefore one of the options mooted to tackle in particular the issues of "orphan works" and possibly also of out-of-print works. The introduction of such practices should take into account the adequate protection of the creators' rights and should not prejudice their commercial interests unreasonably. This could imply that orphan works would only be included in an extended collective licence scheme after a diligent search has confirmed their orphan status. This option could be considered as a general rule in order to

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<sup>44</sup> This includes those persons, corporate or individuals who under the law of certain Member States own the work either because it was created in the course of employment or they have taken an assignment of the relevant rights. The copyright system ensures that rightholders may benefit from property rights entitling them to a share in the revenue for the use of their work. It is central to their success and rests on the simple premise that creative effort which results in a work of value to those who experience or consume it should be remunerated.

create broad coverage and thus a high degree of legal certainty; or as applicable only to certain uses, such as the scanning of orphan works or out-of-print books.

- Community rules on copyright have harmonised the scope and tenor of the exclusive rights<sup>45</sup> without, however, providing clear boundaries for these rights by means of uniform exceptions. This is indeed a state of affairs that should not persist in a truly integrated internal market. The unclear contours of strong "exclusive rights" are neither beneficial for the internal market in knowledge products nor for the development of internet services. Further harmonisation of copyright laws in the EU, in particular relating to the different and optional **limitations and exceptions**, would create more certainty for consumers about what they can and cannot do with the content they legally acquire<sup>46</sup>. The extensive public consultation launched by the Green Paper Copyright in the Knowledge has shown that opinions on exceptions and limitations are deeply divided. The follow-up Communication on Copyright in the Knowledge Economy summarises these views. While libraries and research institutes would like more harmonised exceptions, copyright industries across the spectrum (book publishing, film and record production) form a united front in arguing that contractual licensing is the preferred way forward to implement exceptions and remunerate rightholders. Consumer organisations take a more middle-ground view on exceptions, recently arguing, e.g., that the private copying exception appears too broad. In these circumstances, policy could take a more focused approach, examining each type of exception individually and stating clearly what policy aim is furthered by harmonising an exception and making it mandatory in all Member States.
- In general, a rather more nuanced approach to **exceptions and limitations** might be in order in the medium term. There are "public interest" exceptions for research and teaching or for access to works in favour of persons with a disability on the one hand, and there are the "consumer" exceptions, such as private copying, on the other hand. The Communication on Copyright in the Knowledge Economy suggests that further dialogue is necessary regarding certain exceptions. Future policy should make a clear distinction and proposals should clearly state which exceptions should be harmonised and made mandatory in scope as a matter of priority and the precise goals pursued in doing so.

## 5.2. Commercial users' access

Commercial users' access to diverse creative content on a multi-territory basis with legal certainty and fair tariffs would create a wider range of more attractive and more innovative online services, boosting new business models that use the possibilities offered by digital technologies. The development of the internet has brought significant challenges, not least the fact that commercial users often operate across borders. The essential policy objective is to simplify the cross-border management of rights for online uses such as online music services (iTunes-type downloads or Nokia-type bundled music offerings) and video services (e.g. user generated content services on YouTube, and emerging on-demand TV programmes as well as feature film services). A more rapid development of cross-border internet services is often seen as essential for the attainment of the Lisbon objectives but also as a demonstration of how EU policy can foster the "citizen's agenda".

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<sup>45</sup> With the exception of certain rights of performers, record producers and broadcasters.

<sup>46</sup> Serious consideration should be given to measures facilitating non-commercial re-use of copyrighted content for artistic purposes.



Issues concerning **internet licensing** are highly contentious. The reasons for this complexity are not only linked to the complexity of copyright laws or the ownership situation with respect to many protected works. The reasons are also linked to different rightholders' perspective of the role of copyright management.

Conceptually, the traditional approach to copyright is one of exclusive rights, allowing the owner to authorise or prohibit acts of exploitation (broadcasting, public performances, 'making available' online). With respect to licensing, a traditional copyright approach would thus favour a "property rights" oriented solution. This implies that the owner of a particular copyright (be it a sound recording, a film or a book) would license his property to a user of his choice for use in territories of his choice<sup>47</sup>. While national laws would govern the extent of protection and the enforcement of licensed rights, the owner could chose the territories covered by the license.

On the other hand, especially in the area of licensing of authors' and composers' rights in musical works, the traditional "property rights" approach is entwined with cultural aspects and considerations relating to the collective representation of authors' interests. Recent attempts to create a European licence for musical works have to be assessed against this background. While the digital reproduction rights for a certain repertoire can be licensed centrally for several territories, the performance rights (including digital performance rights) are licensed collectively on a national basis. Future EU policy in the field of online licensing has to recognise that the debate is manifold and that considerations of licensing efficiency need to be reconciled with concerns about collective representation of certain categories of rightholders.

A possible first step towards enhanced licensing efficiency would be the creation of a **streamlined pan-European and/or multi-territory licensing process**. Several sub-options could be discussed in this context.

- The most immediate approach would consist in aggregating the two indispensable "digital copyrights" involved in the interactive online dissemination (e.g. interactive "making available"), the digital right of reproduction and the digital performance right. Both rights currently have to be cleared when providing downloads and interactive streams. This implies that legally licensed online distributors must obtain licences for the digital reproduction right and the right of making available, often in two separate transactions, sometimes from two distinct licensing entities. Consolidating these two 'online' rights into a unitary licence would greatly facilitate online rights clearance.
- A more ambitious form of "one-stop shop" could also be envisaged. This approach would consist in re-aggregating the manifold layers of different rights and rightholders that are contained in a particular work or sound recording and integrating them into a single licence. This would, e.g., imply that the rights of authors, composers, music publishers, the producers of sound recordings and the recording artist pertaining to online dissemination would all be licensed in a single transaction. This option is obviously attractive for users and would bring the music sector more in line with the situation that prevails in book

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<sup>47</sup> A variant of the "property rights" based approach to online licensing would be that a CMO, or a group of CMOs acting jointly, license their own repertoires for all European territories. While this model would surmount territorial fragmentation, it would fragment repertoire as the licence is by necessity limited to the repertoire of one society or a group of partner societies.

publishing or film production. However, at the same time, rather complex issues of how the jointly collected revenue is distributed would have to be agreed<sup>48</sup>.

As mentioned above, **ownership of rights** in musical compositions, audiovisual works and books is substantially different and each would require different solutions. A debate on how to consolidate the often fragmented ownership of rights in musical works might lead to some welcome clarification. The issue of identifying ownership or co-ownership is also closely linked to the idea of establishing an **online database** containing information on rights and their owners.

**Freely accessible ownership and licence information** on world repertoire is an option that has the potential to ease the operation of multi-territory and multi-repertoire licensing and thus help overcome current market fragmentation. A central repository, or an obligation for CMOs to make available a list of their repertoire, would increase transparency and could be useful as a dispute-resolution mechanism. While determining which body or institution would be entrusted with the administration of such information remains to be analysed both in terms of commercial liability and competition concerns, several commercial users and rightholders in the music sector see this as a workable option. While participation should remain voluntary to be compatible with international copyright law, there should be sufficient incentives to use the repository in order to make it effective in reducing market fragmentation. Similar ideas have been floated concerning the audiovisual and publishing sectors.

Regarding **collective rights management** generally, several important issues linked to licensing transactions warrant further exploration.

- Firstly, it should be noted that the outcome of the modernisation of the Television without Frontiers Directive shows that the European Parliament and the Member States generally accept the need for legislative single market solutions with regard to audiovisual content. In particular public service broadcasters appear to favour **an extension of the scope of the Satellite and Cable Directive of 1993 to online delivery of audiovisual content**, paralleling the scope of the new Audiovisual Media Services Directive. Transposing the rationale of this Directive to the Internet could imply that once an online service is licensed in one EU territory, for example the territory with which the service provider is most closely linked, then this license would cover all Community territories. The principal rationale for domiciling licensor and licensee in one territory is to identify the relevant territory in which the multi-territorial license can be obtained. In view of the important remit of public service broadcasters and their recognised role with regard to freedom of information and media pluralism in the EU, this option has therefore the potential to generate substantial public and political support across the EU Member States, in particular if the result would be directly beneficial to consumers.
- Secondly, territorial segmentation of markets is not only a consequence of the persistence of national copyright titles. More often than not, the market segmentation is also the result, e.g., of a commercial operators' decision to encrypt signals that are transmitted in a "footprint" larger than a given national territory. A typical example is the practice today under the Satellite and Cable Directive, which allows rights clearance in a single Member State although the satellite footprint covers several territories. The "single state clearance"

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<sup>48</sup> Such a solution has nevertheless occasionally been implemented in the past, with rightholders agreeing amongst themselves to offer the relevant rights to cable TV operators under a single "general licensing agreement".

model was introduced in 1993 as a new way of simplifying the territory-by-territory licensing process that would otherwise be necessary for satellite transmissions. However, in practice, distributors and rightholders often now contractually segment national markets, for instance by encrypting the signal. Another example is the online sale of music. Several "online shops" operate on a national basis, without directly being forced to do so by rules governing the licensing of the requisite copyrights. Reforming collective management would thus also require an enquiry into the persistence of territorial service limitations at retail level.

- Thirdly, the entire debate on "footprint" licensing as enshrined in the Satellite and Cable Directive will have to be reconciled, and possibly combined, with the pending change of contractual licensing practices triggered by the implementation of the CISAC antitrust decision mentioned above. One possible outcome of the CISAC decision (which is limited to music) might be that several collecting societies could be delivering multi-territorial licences aggregating the music repertoire of several collecting societies. However, it is difficult to predict whether: (i) such a negotiated change of licensing practices would cover all the EU societies' repertoire and (ii) whether coherent licensing territories would emerge as a result of the CISAC decision. There might be advantages in terms of overall consistency and legal certainty if the parameters of future online licensing were determined by legislative means.

In order to create a more coherent licensing framework at European level, some stakeholders are suggesting a more profound **harmonisation of copyright laws**. A "**European Copyright Law**" (established, e.g., by means of an EU regulation<sup>49</sup>) is often mooted as establishing a truly unified legal framework that would lead to direct benefits for the coherence of online licensing. A Community copyright title would have instant Community-wide effect, thereby creating a single market for copyrights and related rights. It would overcome the issue that each national copyright law, though harmonised as to its substantive scope, applies only in one particular national territory. A Community copyright would enhance legal security and transparency, for right owners and users alike, and greatly reduce transaction and licensing costs. Unification of EU copyright by regulation could also restore the balance between rights and exceptions – a balance that is currently skewed by the fact that the harmonisation directives mandate basic economic rights, but merely *permit* certain exceptions and limitations. A regulation could provide that rights and exceptions are afforded the same degree of harmonisation.

By creating a single European copyright title, European Copyright Law would create a tool for streamlining rights management across the Single Market, doing away with the necessity of administering a "bundle" of 27 national copyrights. Such a title, especially if construed as taking precedence over national titles, would remove the inherent territoriality with respect to applicable national copyright rules; a softer approach would be to make such a Community copyright title an option for rightholders which would not replace, but exist in parallel to national copyright titles. Naturally, the existence of such a title would raise important issues

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<sup>49</sup> The legal basis could be the new Article 118(1) of the Treaty on the Functioning of the European Union, as introduced by the Lisbon Reform Treaty, which reads as follows: "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements."

for the organisation of rights management. A recent report analysed the impact that the introduction of a Community title for copyright would have on current rights management practices.<sup>50</sup> Further reflection on the future of European rights management would therefore have to precede the introduction of a Community copyright title.

An altogether different approach, which would either exist alongside traditional copyright licensing (national or EU wide) or replace such licensing between right-owners and commercial users altogether, would be the introduction of **alternative forms of remuneration**. These ideas have been mooted mainly for mass reproductions and dissemination of copyright protected works and sound recordings in the internet or on digital fixed or mobile services.

One idea often and controversially discussed at national level is that ISPs would owe rightholders a form of compensation for mass reproductions and dissemination of copyright protected works undertaken by their customers<sup>51</sup>. This compensation, applicable only to unauthorised file sharing and reproductions, would exist alongside the copyright licences given to operators of legal services<sup>52</sup>.

It is an open question whether implementation of alternative forms of remuneration at EU level could lead to a situation which is acceptable to rightholders, ISPs and consumers, and this is why it is raised in this reflection paper. While an online subscription fee is certainly one form of alternative remuneration, other models for online music subscriptions should play an equal part in this debate. For example, some operators have developed "all-you-can-eat" models for consumers, the price of which is bundled with other services. Careful consideration would have to ensure that any variant of the online subscription fee for mass usage online would not be detrimental to the development of other promising online business models. The application or introduction of alternative remuneration models would also have to be preceded by a careful examination of whether such models are compatible with the "rights based" approach taken in several international copyright conventions, the different aspects of downloading and uploading and the long term sustainability of a creative content market using this model. Finally, reflection on alternative forms of remuneration raises delicate issues of how proceeds would be shared out, given that these new forms necessarily aggregate different rights belonging to different rightholders. This is why the Commission services are seeking substantiated comments and contributions on this point of the debate (so far limited to the national level), without prejudice to any final decisions on this matter.

### 5.3. Protection of rightholders

New media offer rightholders an unprecedented opportunity for disseminating their works or other protected subject matter across different platforms and for reaching out to a larger

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<sup>50</sup> The Recasting of Copyright & Related Rights for the Knowledge Economy, 2006: "Surely, for collecting societies, the prospect of introducing a Community copyright and abolishing 'national' rights is unattractive, to say the least. Territorial rights are the bread and butter of most existing collecting societies"; available at:

[http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf):

<sup>51</sup> E.g., the most recent proposal by the French collecting society SACEM, <http://www.sacem.fr/portailSacem/jsp/ep/contentView.do;jsessionid=KTJB2aI0xN1wH2cmczf2DWMe21knEMRXIK5DzEemttOQeCTZVjx1!1621977062?contentType=2&contentId=536903599&programId=536880422&pageType=536880186>.

<sup>52</sup> See "Rapport de la Commission pour la libération de la croissance française": <http://lesrapports.ladocumentationfrancaise.fr/BRP/084000041/0000.pdf>.

audience. In this view, easier access to creative content will have to be combined with adequate protection of rightholders in order to furnish a growing and more diverse content market. Wider access to content, with more attractive business models for tackling piracy and creating new revenue streams, can only be achieved with more effective licensing mechanisms and financial incentives.

- The introduction of **an extended or mandatory collective management system** for the administration of the "making available" rights of authors and performers and the provision of an additional unwaivable right to equitable remuneration<sup>53</sup> has been also suggested by rightholders. Although these suggestions would seem to add an additional layer of complexity to collective management, they could have the potential to create more effective protection and a stronger position for creators in their negotiations with their production companies.
- Measures focusing on the **governance and transparency of collective rights management organisations** could ensure that the interests of creators are administered in the most efficient manner. As mentioned under 4.3 above, one of the essential issues in collective rights management is the precise contours of the relationship between individual authors or performers and the collective rights management organisation (CMO). Possible approaches would partly overlap with other measures, for instance the requirement that information on the repertoire of collective rights management organisations is publicly available; that certain rights, such as components of the interactive making available right, are entrusted together to the same collective rights management organisation. The terms under which an author, artist or other rightholder joins or leaves a CMO could be clarified. Common rules on governance and transparency would also ensure a level playing field for all collective licensors operating in the EU.
- More **collaboration with ISPs** and other companies providing access technologies would provide more options for rightholders. New business models based on access subscription rather than payment for every single work, together with advertising-supported or feels-like-free services, could become more beneficial for rightholders and ISPs.
- **Financial incentives** for online multi-territory offers of audiovisual works can facilitate new options for the producers and rightholders of audiovisual works, which mostly depend on the financial contributions of local distributors and local funding possibilities. The emergence of new VOD platforms offering multi-territory services, some of them benefiting from EU subsidies from the MEDIA programme<sup>54</sup>, shows the importance of financial incentives for triggering changes in industry practices.

## 6. CONCLUSIONS

The Commission intends to continue to take a pro-active role in order to ensure a culturally diverse and rich online content market for consumers, while creating adequate possibilities for remuneration and improved conditions in the digital environment for rightholders. The Commission will strive to put in place balanced and durable foundations for an innovative and competitive market place across Europe, upon which market players can construct sustainable

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<sup>53</sup> Based on Article 5 the Rental and Lending Directive. Such a right has for example been introduced for the interactive making available right of performers under Spanish law.

<sup>54</sup> [http://ec.europa.eu/information\\_society/media/index\\_en.htm](http://ec.europa.eu/information_society/media/index_en.htm)

online service offerings. Stakeholders can expect the European Digital Agenda to be inspired by these overall objectives.

All interested parties are invited to comment on the ideas raised in this reflection paper, and in particular on the Possible Actions outlined in Chapter 5.

Please submit your comments by **5 January 2010** in electronic format. All submissions will be published on the Commission's website unless otherwise requested. Confidential contributions should be clearly labelled at the top of the first page. Should you want to add a cover letter please do so in a separate document. In case your comments exceed four pages, please provide an executive summary.

Submissions should be mailed to: [avpolicy@ec.europa.eu](mailto:avpolicy@ec.europa.eu) and [markt-d1@ec.europa.eu](mailto:markt-d1@ec.europa.eu).<sup>55</sup>

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<sup>55</sup> For all practical details concerning public consultation, in particular the privacy statement, please check:[http://ec.europa.eu/avpolicy/other\\_actions/content\\_online/index\\_en.htm](http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm)  
[http://ec.europa.eu/internal\\_market/copyright/copyright-info/copyright-info\\_en.htm](http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm)