



International Video Federation

October 12, 2006

**SUBMISSION IN RESPONSE TO THE
COMMISSION'S PUBLIC CONSULTATION ON
CONTENT ONLINE IN THE SINGLE MARKET**

EXECUTIVE SUMMARY

The members of the International Video Federation (IVF) comprise companies, which are involved in all areas of the audiovisual industry (development, production, distribution, etc.) as well as entities dedicated to, and specialized in, the distribution of audiovisual content on physical carriers (DVD and VHS) and/or over digital networks, including the Internet.

The IVF welcomes the opportunity to comment on a number of issues pertaining to the development of online distribution of content in Europe and the implementation of a proactive and coherent Community approach to promote the take-up of new services.

The overall public policy goal should be to encourage innovation and new business development while ensuring choice for consumers and citizens as well as promoting cultural diversity and pluralism. While rich and diverse creative content contributes much to society and to the quality of life of European citizens, it is also a business and the livelihood of European creators, producers and distributors. The European content sectors play a vital role in ensuring that creators can make their works widely available and be justly compensated for their work. The European content sectors also ensure that consumers and citizens throughout Europe have the opportunity to enjoy a wide range of creative products and media services.

For new creative content services and distribution models to work as driving forces for growth and further employment in Europe, a viable business framework is an essential starting point. A stable regulatory environment is necessary to enhance and justify continued investments by all stakeholders. An absolute pre-requisite is an appropriate legal framework ensuring respect for exclusive rights as a means to secure remuneration for creative efforts and a return on investment to producers and investors.

European and national public policy should encourage the development of a multitude of different business models to stimulate investment in many diverse types of creative products and services benefiting the entire value chain and European end-users and citizens in general.

The IVF wishes to stress the importance of maintaining the highest possible degree of flexibility for right holders and market operators to negotiate the time delays between each form of exploitation of an audiovisual work. In addition, right holders' contractual freedom and exclusive right to choose the territorial scope of the rights licensed is crucial to maximising revenues from audiovisual content and remains vital in many cases of European film-making in order to secure funding prior to the shooting of the actual film as the various exploitation rights are basically sold off/licensed prior to, or during, the shooting of the film. New distribution channels such as online delivery of film will naturally have to contribute to the financing of films in a manner similar to that already provided by the pre-sale of rights to theatrical, video and television distribution.

Joint efforts by all stakeholders to fight against online piracy and unauthorized sharing, dissemination and use of copyright content are also essential. Public policy should be about enabling the development in the market place of a legitimate content online offer. The Cannes 2006 “European Charter for the Development and Take-up of Film Online” constitutes a first important step towards improved cooperation between content owners and access and network providers. The next step is the development of wider-ranging inter-industry codes of conduct or appropriate legislation to address piracy encouraging the further uptake of new services in a secure, consumer-friendly environment.

The IVF calls on the European Commission to:

- ensure better implementation and enforcement of single market rules in an enlarged EU. With particular reference to “Content Online”, the EU must be ready to ensure proper application of its legal foundation which must include deterrence against intellectual property crime and online infringements while encouraging the emergence of new, consumer-friendly on-line opportunities;
- take concrete steps to push for the translation of the “European Charter for the Development and Take-up of Film Online” into robust inter-industry codes of conduct that encourage the emergence of new services in a secure, consumer-friendly environment. This could be supplemented by facilitating the emergence of efficient online enforcement mechanisms that comply with the important public policy requirements of data privacy protection as well as protection of intellectual property. Offenders should not be “allowed” to hide behind data privacy rules to escape the enforcement of protection of intellectual property rights which are granted by law;
- use forthcoming reviews of European regulation, e.g. in the telecommunications sector, to ensure that the European information society networks not only provide larger bandwidth, but also contribute to the development of a favourable environment for legal delivery and exchanges of copyright content on the Internet;
- actively encourage and support inter-industry standardisation work currently carried out in various forums and aimed at finding secure “content interoperability” solutions in the digital environment (e.g. within DVB, DLNA, Coral). If needed, the Commission may wish to assist in developing a consensus on the essential public policy requirements underlying the concept of interoperability;
- remove obstacles to fruitful inter-industry co-operation – be they behavioral or legal. To be properly addressed, some of these may require legislation. The Commission should therefore be ready to use all the policy instruments at its disposal to bridge the content protection gap in Europe, in particular with reference to the so-called “analogue hole” and the unauthorized retransmission of unencrypted over-the-air digital television signals; and
- play a role in securing means to enforce compliance with DRM standards, regardless of whether these are of an open or a proprietary nature. While it is true that the legal protection of technological measures granted by the EU Copyright Directive as well as contractual terms related to technological licensing are possible avenues for enforcing compliance with a given system, in certain cases this will not be enough. It will not be sufficient, for example, in cases where there is no so-called “licensing hook”, or where a particular technological measure is not circumvented, but security is nevertheless compromised by a non-compliant device. In such cases, the Commission (or other public authorities) may have to step in and ensure a means of enforcement or the goal of secure interoperability will not be met.

COMMISSION QUESTIONNAIRE

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

The members of the IVF are involved in the distribution of cinematographic works and other audiovisual content both on physical carriers (DVD) and over digital networks, including the Internet. More and more IVF members are pursuing the offer of cinematographic and audiovisual works online, either directly to end-users or working in cooperation with service providers or content aggregators following different business models (e.g. time-limited viewing, streaming or digital delivery of permanent copies). Such new services bring wider choice to consumers as they involve an increasing variety of content, both on the Internet, but also through other types of networks. Although most of the content offered on-line is also offered off-line (e.g. on DVD), specific on-line versions and new content produced specifically for on-line distribution are also being developed.

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

The IVF has no comments to offer on this matter at this stage.

3. Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of a violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.

For new creative content services and distribution models to work as driving forces for growth and further employment in Europe, a viable business framework is an essential starting point.

A stable regulatory environment is necessary to enhance and justify continued investments by all stakeholders involved in the development and offer of new services. An absolute pre-requisite is an appropriate legal framework ensuring respect for exclusive rights as a means to secure remuneration for creative efforts and a return on investment to producers, investors and the creative community. As clearly stated by Commissioner Reding at the 2005 Cannes Film Festival: "Intellectual property rights represent the economic heart of the audiovisual industry as a creative activity. Far from being blocking factors, they pave the way for the competitiveness of the whole sector."

European and national regulation must be sufficiently flexible for businesses to develop and offer consumers and citizens new, viable, diverse, individualized content services and offers in an increasingly competitive market place.

Generally speaking, the appropriate legal environment facilitating the development and take-up of new online content services is in place at EU level. However, forthcoming reviews of European regulation, e.g. in the telecommunications sector, could usefully be deployed to ensure that the European information society networks not only provide larger bandwidth across Europe, but also contribute to the development of a favourable environment for legitimate delivery and exchanges of copyright content on the Internet.

In addition, the EU must continue efforts to ensure that rules and regulations adopted at EU level are properly implemented and applied at national level. This includes educational campaigns as well as deterrent criminal sanctions and civil remedies against intellectual property crime and online infringements while encouraging the emergence of new, secure, consumer-friendly online content delivery services. Developing effective online enforcement mechanisms that respect the important public policy objectives underlying protection of data privacy and intellectual property rights remains a challenge for all parties, including the EU.

Online dissemination of cinematographic and audiovisual works involves a number of technological challenges, which the industries concerned continue to work towards reducing or eliminating. First of all, very basic technological challenges are involved in transferring older works into digital format with an audio and image quality that lives up to modern consumers' expectations – something the cinema sector has become very familiar with over the past ten years in connection with distribution of cinematographic and audiovisual works on DVD. Second, circumvention of technological protection measures cannot be prevented in all circumstances (this is not possible in the world of physical carriers either), but robust safeguards are available and the legal protection of the use of technological measures is in place in EU legislation.

It is crucial to focus future efforts on encouraging migration to legal services and enhancing the dialogue and cooperation between right holders and other parties involved in the new distribution models, e.g. network providers. Improved cooperation between content providers and access providers is crucial to address intellectual property theft in the online environment, and thus create a level playing field in which the new services can compete on fair terms.

The Cannes 2006 “European Charter for the Development and Take-up of Film Online” constitutes a first important step towards improved cooperation between content owners and access and network providers. The next step is the development of wider-ranging inter-industry codes of conduct or appropriate legislation to address piracy encouraging the further uptake of new services in a secure, consumer-friendly environment.

As concluded in Section 4 of the European Charter for the Development and the Take-up of Film Online:

“The European Commission will instigate, during the preparatory phase of the Communication on Content Online which is due by the end of 2006, a process whereby cooperation procedures (such as codes of conduct) will be developed by interested stakeholders, including the participants to the Film Online talks.”

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

The IVF supports the protection of public interests, including the protection of intellectual property rights, both in the offline and online environments. However, some adjustment may be necessary in the online environment in order to most efficiently and effectively meet public policy objectives (e.g. self-regulation and/or co-regulation, promotion of Codes of Conduct that govern the application of public policy rules in view of the specificities of the online environment). In our view, this does not automatically imply a conflict between consumer interests (e.g. protection of privacy, access to information, etc.) and business interests (e.g. copyright, enforcement, etc.). For example, DRMs enable copyright owners to make licensed content available to consumers in very diverse models at different price points (premium content, on-demand, subscription, one copy or several copies) and/or on new delivery forms or formats (e.g. next-generation DVDs).

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

The main driver for the IVF members is to meet consumer needs and demands. It goes without saying that it is in the interest also of right holders that their content may be enjoyed in as many different forms and on as many different types of equipment as possible.

However, the topic of “interoperability” often confuses concerns that not all devices will accommodate all types of content in all forms and/or formats with concerns about the scope of copyright exceptions and whether copyright content protected by technological measures and offered to consumers can be accessed by consumers when and where copyright exceptions allow certain uses that would otherwise be considered copyright infringements. As always, the relationship between copyright exceptions and the legal protection of technological measures gives rise to much controversy, despite the fact that the Copyright Directive, upon much reflection by the Member States and the European Parliament, provides a balanced mechanism to deal with this issue.

Interoperability and security of content need not be mutually exclusive – interoperability should not be achieved at the expense of security. The Copyright Directive provides legal protection for technological measures used to protect works against circumvention and trafficking in circumvention devices and services. Right holders and users of copyright works should, where necessary, reach voluntary agreements to afford the beneficiaries of exceptions who would otherwise not be able to benefit from them, the ability to do so (see Article 6.4 and Recitals 51/52 of the Copyright Directive).

The market itself is now beginning to deal with these issues and the IVF therefore strongly favours avoiding public intervention, for example in the form of prescriptive or simplistic solutions that waive the legal protection of technological measures granted by the Copyright Directive. Moreover, a proper evaluation of the scope of the purported problems is necessary before any future action/intervention is considered. Multi-industry cooperation is already

evolving to address security and interoperability issues. Proposed interventions should be limited to properly evidenced cases of market failure and only where it can be shown that proposals would lead to improved investment incentives and greater service innovation. One area that could be explored is the development of a definition of essential public policy principles and requirements in the area of interoperability rather than attempting to prescribe technology-specific solutions, which are better left to industry-led initiatives.

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

Citizens today have more possibilities than ever before to access, display, reproduce and distribute content online in a perfect, immediate and inexpensive way. Thus, the online environment clearly promotes cultural diversity, as confirmed by the ever-growing range of content available online (professionally as well as privately produced).

Funding for digitisation of content by the legitimate right holders through the MEDIA Programme and national support mechanisms should be encouraged and supported, the aim being to incentivize the digitisation of European works to create a critical mass of European content in digital form for online dissemination. This will further enhance cultural and linguistic diversity online.

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

The practical experience of the IVF members is focused on the European territories. The European market is unique with its 25 different countries and many more languages. This brings particular challenges and opportunities to market operators in the European region, and makes a useful comparison with other world regions difficult and possibly of limited use.

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

The members of the IVF are active across the European Community and are involved in many different forms of online activities. They believe that consumer demand will ultimately determine whether specific delivery models will prevail over others – as is also the case in the market for physical carriers of copyright content.

As to the licensing models that are being pursued in the market-place, these reflect, and correctly so, the diverse needs of the European creative community and their customers. All parties are best served by arms-length commercial negotiations based on the principle of contractual freedom. Different licensing models are developed to suit different business

models to meet multiple consumer demands. Right holders seek to maximize the return on investment on existing content in order to be able to create new content, and in some cases, the production of the content (e.g. the cinematographic work itself) will depend on the license income in the first place (pre-sale of rights will finance the production of the film). Right holders are currently free, and should remain free in the future, to license content on linguistic, multi-territorial or other bases, as a function of the optimal commercial exploitation of the copyright work to the benefit of all the creative and financial contributors to the work. This contractual freedom and exclusive right to choose the territorial scope of the rights licensed is particularly vital to European film-making. New distribution channels such as online delivery of film will naturally have to contribute to the financing of films in a manner similar to that already provided by the pre-sale of rights to theatrical, video and television distribution.

European and national public policy should encourage the development of a multitude of different business models to stimulate investment in many diverse types of creative products and services benefiting the entire value chain and European end-users and citizens in general.

The IVF also wishes to emphasize the importance of maintaining the supremacy of exclusive rights as provided for in international copyright treaties and the mirroring *acquis communautaire*. Exclusive rights are essential to the copyright system in the audiovisual sector, including the right holder's entitlement to choose whether to manage the rights concerned individually or collectively. As many right holders collaborate to create a film, the producer will almost always be responsible for securing the investment and funding for the film project as well as for the subsequent exploitation and distribution of the finished film. The producer exercises this role either by direct ownership of copyright or by transfer of rights from other right holders by law or contract. Depending on the national system, these right holders comprise directors, scriptwriters, actors, music score composers, and other relevant parties whose creative contribution to the collective work earns them individual rights under national copyright law. This system has evolved over the years to ensure the optimal exploitation of the audiovisual work as well as legal certainty for down-stream licensees. This centralization of rights provides the producer with the flexibility needed to efficiently exploit the film on behalf of all the right holders involved in the creative process and to take into account the specificities of particular films, markets, consumer tastes, etc.

9. Please supply medium term forecasts on the evolution of demand for online content in your field of activity, if available.

According to Broadband Digital Movies, a new report published by Screen Digest, 2006 will be a watershed year for the digital distribution of movies using open Internet video-on-demand (VoD) technology. Screen Digest predicts that the first signs of recognisable growth in this market will appear in the 2006-2007 timeframe, with total consumer spending on European movie downloading and streaming services accelerating post-2008 to near Euro690m by end 2010, compared to less than Euro10m in 2005. In comparison, European consumers spent approximately EUR 12 billion on video software on physical carriers in 2005.

10. Are there any technological barriers (e.g. download and upload capacity, availability of software and other technological conditions such as interoperability, equipment,

skills, other) to a more efficient online content creation and distribution? If so, please identify them.

New content delivery services must provide a high quality of service and image/sound – consumers have rightfully come to expect very high quality of audiovisual content from the DVD medium. Thus, speed of user-friendly interfaces, network, bandwidth, security and application of content protection technologies are all important elements and crucial to ensuring consumer satisfaction at least equivalent to television or DVD.

Efficient online distribution is dependent on accelerated deployment of robust DRM technologies in the marketplace. In particular, steps need to be taken to improve the security environment by addressing gaps in protection, such as the unauthorized re-transmission of unencrypted over-the-air digital television signal, improvement of the tamper-resistance of software-enabled DRMs and the protection of analogue interfaces on consumer electronics equipment (i.e. to plug the analogue hole whereby protected digital content could be stripped of its associated usage rights by converting to analogue format and then back to digital).

The Commission could play an important role in encouraging and supporting inter-industry work currently being carried out in various fora and aimed at finding robust “content interoperability” solutions for a secure digital environment (e.g. within DVB, DLNA, Coral).

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

While rich and diverse creative content contributes much to society and to the quality of life of European citizens, it is also a business and the livelihood of European creators, producers and distributors. The European content sectors play a vital role in ensuring that creators can make their works widely available and be justly compensated for their work. The European content sectors also ensure that consumers and citizens throughout Europe have the opportunity to enjoy a wide range of creative products and media services.

In this context, it is important to maintain the supremacy of exclusive rights as provided for in international copyright treaties and the mirroring *acquis communautaire*. Exclusive rights are essential to the copyright system in the audiovisual sector, including the right holder’s entitlement to choose whether to manage the rights concerned individually or collectively. As many right holders collaborate to create a film, the producer will almost always be responsible for securing the investment and funding for the film project as well as for the subsequent exploitation and distribution of the finished film. The producer exercises this role either by direct ownership of copyright or by transfer of rights from other right holders by law or contract. Depending on the national system, these right holders comprise directors, scriptwriters, actors, music score composers, and other relevant parties whose creative contribution to the collective work earns them individual rights under national copyright law. This system has evolved over the years to ensure the optimal exploitation of the audiovisual work as well as legal certainty for down-stream licensees. This centralization of rights provides the producer with the flexibility needed to efficiently exploit the film on behalf of all the right holders involved in the creative process and to take into account the specificities of particular films, markets, consumer tastes, etc.

Right holders' contractual freedom and exclusive right to choose the territorial scope of the rights licensed is crucial to maximising revenues from audiovisual content and remains vital in many cases of European film-making in order to secure funding prior to the shooting of the actual film as the various exploitation rights are basically sold off/licensed prior to, or during, the shooting of the film. New distribution channels such as online delivery of film will naturally have to contribute to the financing of films in a manner similar to that already provided by the pre-sale of rights to theatrical, video and television distribution.

The main obstacle encountered by the film industry in securing revenue streams is the steady erosion of investment returns in copyright works due to the effects of digital piracy. As mentioned above, this simply means that less capital is available for investment in the production and distribution of new films.

Fighting digital piracy requires a commitment by public authorities to address the main sources of pirated content (e.g. camcording in cinemas, unauthorised redistribution and making available of works over the Internet, circumvention of technological measures, etc.). This requires public outreach and improved enforcement mechanisms that are credible and deterrent, as well as further incentives for network/service providers to cooperate with copyright owners to address piracy on the Internet.

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

The IVF believes this question is more appropriately answered by companies directly applying payment systems. As a matter of general comment, though, the development of secure, interoperable standards and efficient and secure micro payments systems should be encouraged and promoted.

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

The pricing systems and/or strategies are developed by the individual players involved in offering copyright content to end-users.

As it is crucial for the content sector to continue to innovate and ensure a fair return on investment, the IVF and its members strongly warn against any form of market intervention (e.g. compulsory licenses, additional limitations on the rights of copyright holders), which would only hinder content creators in ensuring an appropriate return on investment. Such interventions also raise legal questions at the EU and international levels. Pricing and strategy decisions should always be market-driven.

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

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

Joint answer to Questions 14 & 15:

The members of the IVF are involved in rights clearance both as licensees and licensors on a daily basis across borders, whether geographic or linguistic. Although defining and agreeing on a specific licensing model can sometimes involve time-consuming contractual negotiations, licensing negotiations and rights clearance are the essence of the film industry's business model – this is how the production and creative community tries to cover the production costs and make a return on its investment. Without these negotiations, content producers and distributors are deprived of the essential way of financing production and distribution of content. This is particularly true for smaller and medium-sized producers whose very existence depends on a precarious mix of funding sources including pre-sales of rights.

As to the unilateral decision of the right holder to license on a single or multi-territorial basis, right holders choose one or other option on a case-by-base basis as a function of many elements and specificities of the local market (cultural preferences, classification regulations, language, etc.) and the requirement to ensure consumer satisfaction. International, EU and national law recognize the territorial nature of copyright as a choice of the right holder, and the territorial application of copyright does not in any way preclude, from a legal point of view, EU-wide or cross-border licensing models.

The contractual freedom granted to right holders to license their content the way they choose does not constitute an obstacle to the launch of innovative services available across borders. The negotiation of the territorial scope of a particular license is, and should remain, a commercial matter between the right holder and the content distributor or aggregator. This results in a multitude of different models for different content and aimed at different consumer requirements.

In this context, we wish to emphasize the importance of maintaining the supremacy of exclusive rights as provided for in international copyright treaties and the mirroring *acquis communautaire*. Exclusive rights are essential to the copyright system in the audiovisual sector, including the right holder's entitlement to choose whether to manage the rights concerned individually or collectively. As many right holders collaborate to create a film, the producer will almost always be responsible for securing the investment and funding for the film project as well as for the subsequent exploitation and distribution of the finished film. The producer exercises this role either by direct ownership of copyright or by transfer of rights from other right holders by law or contract. Depending on the national system, these right holders comprise directors, scriptwriters, actors, music score composers, and other relevant parties whose creative contribution to the collective work earns them individual rights under national copyright law. This system has evolved over the years to ensure the optimal exploitation of the audiovisual work as well as legal certainty for down-stream licensees. This centralization of rights provides the producer with the flexibility needed to efficiently exploit the film on behalf of all the right holders involved in the creative process and to take into account the specificities of particular films, markets, consumer tastes, etc.

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

The basis for right holders' remuneration should continue to be contractual negotiations conducted between the copyright holder and the copyright user, except of course in the limited cases where collective licensing is required by law (e.g. cable retransmission, as per the EU's 1993 "Cable and Satellite" Directive).

DVD publishers/distributors do not generally receive private copy levies, which, as applicable under national law, are usually paid out to audiovisual producers (and other right holders in copyright audiovisual content). Thus, apart from those members of the IVF which are also involved in audiovisual production, the IVF members are not beneficiaries of private copy levies. However, the IVF wishes to take this opportunity to make some general remarks on the matter of private copy levies.

The starting point for any examination of private copy levies must be the language of Article 5.2(b) of the Copyright Directive:

“reproductions on any medium by a natural person for private use and for ends that are neither directly or indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures . . . “

It is imperative to recognize that private copying is an exception to an otherwise exclusive right – private copying is not, as advocated by some groups, a right in itself. Thus, a correct definition of the scope of the private copy exception in the national implementation of Article 5.2(b) is required, including a reference to the principle of legal source/access (the exception is only available when the source/access is legal) as well as strict adherence to the three-step test set out in Article 5.5 of the Copyright Directive.

Another crucial element is that appropriate legal protection for technological measures as required by Article 6 of the Copyright Directive must be made available under national law. Appropriate legal protection includes protection for access and copy controls, prohibition of acts of circumvention and preparatory acts of circumvention accompanied by effective sanctions.

The members of the IVF do not consider that levies fully compensate right holders for the loss of their ability to exercise their exclusive reproduction rights, especially in the digital age.

There is also the danger that end-users mistakenly consider that levies are payment for any copying from any source – legal or illegal – amounting to a disguised compulsory license to copy. This was for example a key argument in the French *Que Choisir* case, but was rejected by the French Supreme Court in its decision of February 28, 2006¹. More recently, the French Supreme Court (criminal chamber) held that a lower court must examine the circumstances under which a party has obtained access (i.e., legal or not) to the content concerned where that party seeks to invoke the private copy exception as a defense to an alleged infringement of the exclusive reproduction right.²

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

For new creative content services and distribution models to work as driving forces for growth and further employment in Europe, a viable business framework is an essential starting point.

A stable regulatory environment is necessary to enhance and justify continued investments by all stakeholders. An absolute pre-requisite is an appropriate legal framework ensuring respect for exclusive rights as a means to secure remuneration for creative efforts and a return on investment to producers and investors. As clearly stated by Commissioner Reding at the 2005 Cannes Film Festival: “Intellectual property rights represent the economic heart of the audiovisual industry as a creative activity. Far from being blocking factors, they pave the way for the competitiveness of the whole sector.”

European and national regulation must be sufficiently flexible for businesses to develop and offer consumers and citizens new, viable, diverse, individualized content services and offers in an increasingly competitive market place.

Generally speaking, the appropriate legal environment facilitating the development and take-up of new online content services is in place at EU level. However, forthcoming reviews of European regulation, e.g. in the telecommunications sector, could usefully be deployed to ensure that the European information society networks not only provide larger bandwidth across Europe, but also contribute to the development of a favourable environment for legitimate delivery and exchanges of copyright content on the Internet.

In addition, the EU must continue efforts to ensure that rules and regulations adopted at EU level are properly implemented and applied at national level. This includes educational campaigns as well as deterrent criminal sanctions and civil remedies against intellectual property crime and online infringements while encouraging the emergence of new, secure, consumer-friendly online content delivery services. Developing effective online enforcement mechanisms that respect the important public policy objectives underlying protection of data privacy and intellectual property rights remains a challenge for all parties, including the EU.

¹ Perquin/UFC *Que Choisir v. Films Alain Sarde, Universal Pictures Video France & Studio Canal Image/Studio Canal*, Paris – Cour de Cassation (CIV. 1), February 28, 2006.

² Procureur Général Près la Cour D’Appel de Montpellier et all v. Aurélien Delicourt – Cour de Cassation (Chambre Criminelle), May 30, 2006.

Online dissemination of cinematographic and audiovisual works involves a number of technological challenges, which the industries concerned continue to work towards reducing or eliminating. First of all, very basic technological challenges are involved in transferring older works into digital format with an audio and image quality that lives up to modern consumers' expectations – something the cinema sector has become very familiar with over the past ten years in connection with distribution of such content on DVD. Second, circumvention of technological protection measures cannot be prevented in all circumstances (this was not possible in the world of physical carriers either), but robust safeguards are available and the legal protection of the use of technological measures is in place in EU legislation.

It is crucial to focus future efforts on encouraging migration to legal services and enhancing the dialogue and cooperation between right holders and other parties involved in the new distribution models, e.g. network providers. Improved cooperation between content providers and access providers is crucial to address intellectual property theft in the online environment, and thus create a level playing field in which the new services can compete on fair terms.

The Cannes 2006 “European Charter for the Development and Take-up of Film Online” constitutes a first important step towards improved cooperation between content owners and access and network providers. The next step is the development of wider-ranging inter-industry codes of conduct or appropriate legislation to address piracy encouraging the further uptake of new services in a secure, consumer-friendly environment.

Under the EU fiscal regime, reduced VAT rates may be applied to books, concert performances, admissions to museums and cinemas, and the reception of broadcasting services. However, electronic delivery of, or physical carriers containing, the same cultural content must be taxed at normal VAT rates. Thus, while films enjoyed in cinemas and via broadcasting services may benefit from reduced VAT rates under relevant EU law, the current fiscal treatment requires VAT to be levied to the same films when enjoyed on physical carriers and/or by electronic delivery. This discrepancy should be corrected as a matter of urgency so that content is granted the same fiscal status irrespective of the mode of consumption.

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

The members of the IVF operate throughout the European Union. In all countries, our members are involved in, support and encourage national initiatives to develop online content and services. However, the IVF believes that EU-level solutions could provide added impetus to pursuing local initiatives as well as maintaining a level-playing field and reduce distortions in the internal market.

The Cannes 2006 “European Charter for the Development and Take-up of Film Online” constitutes a first important step towards improved cooperation between content owners and access and network providers. The next step is the development of wider-ranging inter-industry codes of conduct, or appropriate legislation to address piracy, encouraging the further development of new services in a secure, consumer-friendly environment.

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

The practice of adopting short time delays between each form of exploitation of an audiovisual product (cinema, video, TV, electronic delivery) is crucial to the audiovisual industries, and its importance to their economic viability has been recognized by the European Court of Justice on several occasions. The purpose of the system is to maximize revenues from each form of exploitation of an audiovisual product, and is also reflected in the way independent producers worldwide raise production financing by pre-selling or licensing distribution rights in individual markets or media, or both. The substantial investment and risk in purchasing distribution rights and in customizing films for individual European markets (subtitling, dubbing, duplication, censorship requirements, etc.) should be recognized and respected. In addition, the employment benefit to European distribution and wholesale operations, merchandising companies, duplication facilities and dubbing studios, advertisers, printers etc. should also be recognized.

Some European countries apply a system of legislated or mandatory “windows” governing the time period between release of an audiovisual work on different media. It is argued that such mandatory windows promote the life span of an audiovisual work throughout the different distribution channels. However, in practice, they remove the ability of right holders to exercise flexibility in respect of individual works and have a detrimental effect on the growth and future success of the audiovisual industry. This view was indeed supported by Member States during the last review of Article 7 of the Television Without Frontiers Directive, which leaves media chronology to commercial negotiations between the right holders involved.

Contractual freedom to agree release windows between right holders is fundamental under copyright; it protects the individual right holders and benefits the industry as a whole by permitting maximisation of revenue from each independent distribution channel, in turn to be reinvested in future production and distribution. Contractual freedom also permits right holders to continue to take account of local cultural factors determining the optimal release of an audiovisual work in the different distribution channels.

With the multiplication of distribution channels in the online environment, the need for flexibility in the choice of how and when to release a film increases even further, especially to continue to ensure the optimal exploitation in any given market.

20. The Internet is currently based on the principle of "network neutrality", with all data moving around the system treated equally. One of the ideas being floated is that network operators should be allowed to offer preferential, high-quality services to some service providers instead of providing a neutral service. What is your position on this issue?

The IVF has no comments to offer on this matter at this stage.

21. To what extent does your business model suffer from piracy (physical and/or online)? What kinds of action to curb piracy are taken in your sector/field of activity

and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between “small” and “big” ones?

2005 marked an important new phase for the European video industry: DVD sales achieved growth despite a challenging retail environment with decreasing prices, escalating piracy and unauthorized file-sharing over the Internet.

Protection of and respect for intellectual property rights is key to the continued existence and future growth of the European video industry, both off-line and online. It is also the measure by which the people who contribute to creativity and film-making can be remunerated. The production of new films is made possible by the reinvestment of revenues from existing films. Yet this essential process is threatened by the increasing illegal use of unauthorized copies of films and by the wide-spread perception that “access to content and culture” should necessarily mean “free access” in all circumstances. This will need to be kept in mind by public authorities when establishing a level playing field for new commercial business models which, as is the case for traditional forms of exploitation, cannot compete with “free” access to content. Proper implementation and enforcement of European legislation (e.g. the Copyright Directive and the Enforcement Directive) is also key to establishing the level playing field.

The distinction between uploading and downloading is becoming less and less meaningful in view of the development of file-sharing technologies whereby users, while downloading a file, are simultaneously uploading the parts of the given file that have already been downloaded to their computers. Indeed, many of these systems require users to make files available in return for accessing the files of others. Legislation should provide stronger penalties and provide the means to bring actions against the entity/person that first made the illegal copy of a copyright work available online.

The IVF and its members, in partnership with the local film industries and national anti-piracy organizations (funded by the film industry itself and sometimes with a government contribution), seek to assist law enforcement authorities across Europe in joint efforts to ensure respect for intellectual property rights and the pursuit of infringements.

Emphasis must be put on encouraging migration to legal services and enhancing dialogue and cooperation between right holders and other parties involved in the new distribution models, e.g. network providers. Improved cooperation between content providers and access providers is crucial to address intellectual property theft in the online environment.

The Cannes 2006 “European Charter for the Development and Take-up of Film Online” constitutes a first important step towards improved cooperation between content owners and access and network providers. The next step is the development of wider-ranging inter-industry codes of conduct, or appropriate legislation to address piracy, encouraging the further development of new services in a secure, consumer-friendly environment.

In addition, the Charter also states that:

“Content providers and online service providers will promote the establishment and effective operation of adequately-resourced national anti-piracy organizations, encouraging and assisting those organizations to work together. The European Commission will promote enhanced networking between national and local anti-piracy organizations.”

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

Awareness-raising campaigns emphasizing the importance of copyright to society as an incentive for content creation constitute one of three main prerequisites (alongside promotion of legitimate online services and the effective fight against piracy) for the development of a healthy online environment, where creativity and investment is stimulated and consumer expectations are met.

The IVF fully supports the 2006 “European Charter for the Development and Take-up of Film Online” stating that “[c]reating a culture of proper respect for creativity and effective protection of copyright is essential if the creative community is to be encouraged to make films available online. Improving communication and educational messages on copyright is therefore important for all of us in the digital value chain. It is vital that consumers understand and appreciate the value of content; this must be done by challenging the perception – held by some – that content should be accessible for free.”

The IVF and its members contribute to and/or support a wide variety of educational outreach strategies targeted at different audiences in the EU Member States. Educational programmes informing young people about the value of the creative economy have notably been devised with local expertise and are running in a number of countries. Other examples of outreach aimed at the general public include: The UK Industry Trust for IP Awareness (<http://www.bva.org.uk/content.asp?id=13420&headline=38>), the Dutch Filmwereld initiative (<http://www.filmwereld.net/filmwereld/home.asp?paginaam=homepage>), and the German “Respect Copyrights” campaign (<http://www.respectcopyrights.de/>).

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

Provided the content exchanged is legally sourced, P2P technology in itself is of great interest to the film sector as an efficient means of content distribution as digital movie files are generally very large. Thus, the speed and bandwidth efficiency provided by P2P technology can help ensure that the downloading time of a legitimately acquired movie file is kept at a speed ensuring a high level of consumer satisfaction.

The use of P2P technology in the legitimate online marketplace for film and audiovisual content delivery has already started (BitTorrent in the United States, and the “In2movies” service in certain German-speaking territories in Europe).

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

The IVF was actively involved in the preparations leading to the adoption in 1998 of the “Council Recommendation on the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity”. The IVF fully supports the goals of and the principles expressed in the Council Recommendation.

The European video industry recognizes that content classification systems for video products have benefits by providing information and, in certain cases, a warning to consumers, retailers and rental shops of the recommended age for the viewing of a specific video product, while also enabling adults to view entertainment intended for adults only, independently of the potential vulnerability of a young audience.

There is no single mandatory or voluntary content classification system for video product (off-line or online) in the European Union. Because of social and cultural differences, the content classification systems applicable to video product vary from country to country.

Content classification should be seen in the context of the differing national, social and cultural preoccupations mentioned above. Indeed, questions of suitability for different age groups are largely a matter of what is considered appropriate to a particular time and country: the social, cultural and legal treatment of these questions varies from country to country and evolves with the passage of time. Some countries have chosen to regulate content classification both in the cinema and video sectors, other countries have limited mandatory content classification to the cinema sector, and others again have left it up to the industry to adopt its own code of conduct. The IVF has assisted several of its member associations in the introduction of self-regulatory, voluntary classification systems providing information to consumers, parents and the commercial sector. The IVF and its members strive to reassure the public that classification systems can be trusted and that their terms and conditions are complied with by publishers, distributors and retailers.

Taking into consideration the widespread differences between what is considered to be “harmful” to different age groups in the individual EU Member States, the IVF and its members do not favour action at European level on this matter. The promotion of self-regulation, as endorsed by the Council in its 1998 recommendation, is a better way to address the different national, social and cultural preoccupations, which undeniably continue to exist at Member State level.

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

The members of the IVF have used DRM technology since the market introduction some 10 years ago of the DVD format (copy-protection technology applied). In the new network distribution models, including over the Internet, DRM technology continues to play a central

role in offering consumers the ability to enjoy content when and where they want and to pay only for what they want to receive.

The key to providing consumers greater choice in their use of copyright works is enabling copyright owners to effectively exercise and protect their rights in copyright works through constructive management of their exclusive rights in the online environment. Effective DRMs are needed to ensure secure exploitation of works, recovery of related investment, and deployment of new business models.

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

While the deployment and use of DRM systems in the marketplace is increasing steadily, DRM uptake will only properly accelerate towards a mass market scale once steps are taken to ensure compliance with agreed standards and to address certain current gaps in content protection:

- the widespread dissemination of hacking tools over the Internet; and
- computers and consumer electronic equipment frequently have unprotected analogue video outputs/inputs that allow for the conversion of protected digitized content into analogue format and then re-digitisation without respect for usage rules associated with the original digital file (thereby exploiting the so-called “analogue hole”).

These gaps pose a challenge to the development of a healthy DRM-enabled environment for legitimate delivery of content online, which is needed to realise the full potential of the European digital broadband networks. The European Union and the Member States should address these technological challenges through encouragement and, as appropriate, facilitation of cooperation between content creators and providers, technology providers and other interested stakeholders in order to improve the security environment.

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

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

Joint answer to Questions 27 & 28:

As mentioned above, DRMs are widely used by the film industry, notably to support DVD distribution and the new online distribution services that allow copyright owners to make content available to consumers in innovative ways involving extensive product and services diversification.

Hence, it is by facilitating the legitimate provision of copyright content to consumers that DRMs and technological protection measures help strike a fair balance between ensuring right holder remuneration and meeting consumer expectations in the digital environment.

We would argue that copyright holders and consumers have converging objectives, with right holders having a clear market incentive to satisfy effective demand for flexible pricing and innovative means of consumption, whereas consumers are expecting a diversified menu of choices. Improvements of user-friendliness are being made to ensure that consumers are fully aware of the exact usage rights – defined in the DRM tool or by the technological protection measure – associated with a particular piece of content.

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

The concept of “interoperability” is much more than mere compatibility between content delivery platforms and consumer electronics equipment. Interoperability should also encompass consistent functioning of the overall system of security and access, i.e. the mutual recognition and respect for usage rules, content and technical measures in all the ways in which they were intended to function from the outset. Interoperability should not take place at the expense of eroded security and it should be understood that initiating new avenues of network and equipment interoperability without at the same time addressing content security requirements will result in failure to achieve the real goal of “content interoperability”. Thus, a system that fails to strike the right equilibrium could not deliver true content interoperability and would simply incite piracy.

One of the key goals of ongoing standardisation efforts is to ensure interoperability as it relates to the ability of the consumer to choose between different devices and services. Standardisation efforts have an important role to play in promoting the uptake of DRMs in the marketplace.

The importance of securing means to enforce compliance with DRM standards, regardless of whether these are of an open or a proprietary nature cannot be underestimated. While it is true that the legal protection of technological measures granted by the EU Copyright Directive as well as contractual terms related to technological licensing are possible ways of enforcing compliance with a given system, in certain cases this will simply not be enough. It will not be sufficient, for example, in cases where there is no so-called “licensing hook”, or where a particular technological measure is not circumvented, but security is nevertheless compromised by a non-compliant device. In such cases, the Commission (or other public authorities) may have to step in and ensure a means of enforcement or the goal of secure interoperability will not be met.

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

The members of the IVF fully support the overall public policy objective of preserving Europe’s rich and diverse cultural heritage and facilitating the appreciation thereof by European citizens. As producers and distributors of audiovisual and cinematographic works, our members understand the value to the industry and society at large of preserving and providing access to this highly valuable component of Europe’s cultural heritage. Our members continue to contribute to this important process by participation in both mandatory

and voluntary deposit schemes at national level, which, coupled with individual agreements with libraries and film archives, provide the necessary framework for the subsequent preservation of the deposited materials and establish the terms and conditions under which the deposited materials may be made accessible to the public for research and cultural purposes.

The European creative content sector is at the heart of the knowledge-based economy and European creative products and services are indispensable to the successful uptake of high-speed digital networks. New revenue streams stimulated by Internet, broadband and wireless technologies are expected to account for a significant portion of this growth.

Thus, while rich and diverse creative content contributes much to society and to the quality of life of European citizens, it is also a business and the livelihood of European creators, producers and distributors. The European content sectors play a vital role in ensuring that creators can make their works widely available and be justly compensated for their work. European content sectors also ensure that consumers and citizens throughout Europe have access to a wide range of creative products and media services.

Public policies aimed at enhancing Europe's cultural heritage should not jeopardize investment in the creative works and services which constitute Europe's digital future. Any future policy initiatives in this area must take full account of the international copyright treaties and the *acquis communautaire*, so that any digitisation, making available and preservation of Europe's cultural content takes place in full respect of copyright and related rights.

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

European equipment and software manufacturers have a complementary role to play – alongside content providers and platform operators – in the development of a thriving marketplace for digital online content. However, for this objective fully to materialise, closer inter-industry cooperation is needed to ensure that a secure environment for content delivery is effectively put into place. Concretely, inter-industry efforts should aim at further development of content protection systems ensuring protection:

- during delivery, i.e. for packaged media (e.g. high-definition DVDs) and DRM-enabled conditional access systems (e.g. PayTV, web-based Internet downloads, mobile and portable media players); and
- after delivery, i.e. for analogue and digital interfaces, secure digital home networking and managed remote access.

As concrete examples of inter-industry forums where stakeholders are seeking solutions to the challenges outlined above and which would benefit from the support of the European Commission, we refer to the Digital Video Broadcasting Project (DVB) on a "Content Protection & Copy Management" (CPCM) system, the Digital Living Network Alliance (DLNA) on interoperable video networking, and the Coral Consortium on an interoperability framework across proprietary DRM solutions.

However, even though the film industry is hopeful that much can be achieved in terms of secure content interoperability through inter-industry standardisation efforts, there are nevertheless two areas where the need for governmental/EU support is clearly warranted if specific gaps in protection are to be effectively addressed:

- the implementation of a “redistribution control” mechanism to ensure that unencrypted over-the-air digital television signals are not illegally retransmitted over the Internet (this is a crucial challenge for the future viability of free-to-air television); and
- the challenge of plugging the so-called “analogue hole”, whereby protected digital content can be stripped of its associated usage rights by converting to analogue format and then back to digital (this is an important requirement in order to preserve the effectiveness of all content protection systems).

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

It is up to the market players to develop, experiment and adopt new business models for the online environment. Public authorities do, however, have an important role in encouraging the uptake of such new services, in removing obstacles to the migration to legal delivery services, and in promoting dialogue between rights-holders, service and network providers. A high level of cooperation between content providers and access providers is a key component in addressing intellectual property theft.

For new creative content services and distribution models to work as driving forces for growth and further employment in Europe, a viable business framework in particular for the content industries is an essential starting point.

High quality digital content and great films are a driver for the modern digital economy, but business models should not be built on a free-rider principle. Right holders must be paid a fair return on their investment and creative efforts so that they are able to reinvest in the production of new, high-quality films and content. The challenge is not only to increase the awareness of the consequences of infringements for right holders and the creative community, but also for citizens and consumers, who inevitably lose out when less new content is created due to contracting revenue streams from existing content.

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

Several actions could be taken at EU level to address the concerns of the creative community. The members of the IVF call on the Commission to:

- ensure better implementation and enforcement of single market rules in an enlarged EU. With particular reference to “Content Online”, the EU must be ready to ensure proper application of its legal foundation which must include deterrence against intellectual property crime and online infringements while encouraging the emergence of new, consumer-friendly on-line opportunities;

- take concrete steps to push for the translation of the “European Charter for the Development and Take-up of Film Online” into robust inter-industry codes of conduct that encourage the emergence of new services in a secure, consumer-friendly environment. This could be supplemented by facilitating the emergence of efficient online enforcement mechanisms that comply with the important public policy requirements of data privacy protection as well as protection of intellectual property. Offenders should not be “allowed” to hide behind data privacy rules to escape the enforcement of protection of intellectual property rights which are granted by law;
- use forthcoming reviews of European regulation, e.g. in the telecommunications sector, to ensure that the European information society networks not only provide larger bandwidth, but also contribute to the development of a favourable environment for legal delivery and exchanges of copyright content on the Internet;
- actively encourage and support inter-industry standardisation work currently carried out in various forums and aimed at finding secure “content interoperability” solutions in the digital environment (e.g. within DVB, DLNA, Coral). If needed, the Commission may wish to assist in developing a consensus on the essential public policy requirements underlying the concept of interoperability;
- remove obstacles to fruitful inter-industry co-operation – be they behavioral or legal. To be properly addressed, some of these may require legislation. The Commission should therefore be ready to use all the policy instruments at its disposal to bridge the content protection gap in Europe, in particular with reference to the so-called “analogue hole” and the unauthorized retransmission of unencrypted over-the-air digital television signals; and
- play a role in securing means to enforce compliance with DRM standards, regardless of whether these are of an open or a proprietary nature. While it is true that the legal protection of technological measures granted by the EU Copyright Directive as well as contractual terms related to technological licensing are possible avenues for enforcing compliance with a given system, in certain cases this will not be enough. It will not be sufficient, for example, in cases where there is no so-called “licensing hook”, or where a particular technological measure is not circumvented, but security is nevertheless compromised by a non-compliant device. In such cases, the Commission (or other public authorities) may have to step in and ensure a means of enforcement or the goal of secure interoperability will not be met.

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The IVF remains at the Commission’s disposal for further information where necessary.

October 12, 2006
INTERNATIONAL VIDEO FEDERATION