



## **Creativity Works! Position on the Review of the EU Copyright Rules**

Creativity Works! is a coalition of like-minded organisations from the European cultural and creative sectors. We represent a wide range of stakeholders, from film directors, video games developers, broadcasters, writers, screenwriters and book publishers to sports organisations, cinema exhibitors, picture agencies, music and film/TV producers, publishers and distributors.

The European Commission launched a Public Consultation on the review of the EU Copyright Rules in early December 2013. The Commission's main objective as it considers a copyright review should be to ensure that in the digital age, Europe **maintains the right regulatory conditions** to enable our **sectors to keep creating and investing in creative content and innovative new delivery formats** for consumers to enjoy.

The Commission must maintain an **evidence-based approach** to its review of the copyright rules, ensuring that the **debate is balanced and constructive** and the **necessary time is given to consider and thoroughly review all information** and evidence available. In particular, it must take into account the ongoing market developments and efforts of the creative sectors to meet consumer needs.

**Europe must be a place where creators, creative industries and citizens can continue to thrive.** Dynamic and flourishing creative sectors are crucial for any digital economy to prosper. The EU Copyright Directive as well as the Acquis has demonstrated its flexibility by enabling our sectors to continuously invent, invest in and create new cultural works for citizens to enjoy in the digital age.

This document includes some core principles which we believe should underpin the review of the EU copyright rules, as well as an overview of our positions on key themes in the Commission's current consultation.

### **About Creativity Works!**

Our objective is to kick-start an open and informed dialogue with EU policy-makers about the economic and cultural contribution made by creators and the cultural and creative content sectors in the digital age. Our members are brought together by a sincere belief in creativity, creative content, cultural diversity and freedom of expression.

**Members include:** Association of Commercial Televisions in Europe (ACT), European Coordination of Independent Producers (CEPI), Premier League, Bundesliga, International Federation of Film Producers' Associations (FIAPF), Federation of European Publishers (FEP), Interactive Software Federation of Europe (ISFE), International Video Federation (IVF), Motion Picture Association (MPA), International Union of Cinemas (UNIC), Federation of European Film Directors (FERA), and Independent Music Companies Association (IMPALA), EUROKINEMA, Center of the Picture Industry (CEPIC), European Writers' Council (EWC), Federation of Screenwriters in Europe (FSE)

More at [www.creativityworks.eu](http://www.creativityworks.eu)

## Creativity Works! Core Principles

- Europe's **cultural diversity and creative edge are strategic assets** underpinning the EU's global soft power, and should be strengthened.
- **Europe's creative sectors are an integral part of our cultural and economic fabric**, especially as images, words, sounds and ideas have increasingly become the drivers of innovation and growth, jobs and prosperity. IP-intensive industries contribute **26% of EU employment and 39% of GDP**; within this, the core Copyright-intensive industries generate **7 million jobs**, contribute approximately **€509 billion to the economy** and produce a healthy trade surplus.<sup>1</sup>
- **Copyright is the most effective enabler for the creation, financing, production and dissemination of cultural works.** It is the economic foundation for Europe's cultural and creative industries and drives massive investment in diverse and professional content, continued growth and innovation in Europe. Major commercial broadcasters in Europe for example spend over €15 billion annually on content – an impressive €41 million every day.<sup>2</sup> European book publishers released 535,000 new titles in 2012.<sup>3</sup>
- The **creative sectors are champions of emerging technologies**, driving change and innovative solutions so professional and private users can access and interact with ever more creative content online. The app explosion for example is largely games-based, with 72% of all App Store revenue now coming from that sector.<sup>4</sup>
- **Copyright Works! The market is delivering and online offers are booming** – never before have European citizens had access to so many works and services. Today we can enjoy over 2 million e-book titles, over 30 million licensed songs, and over 3000 Video-on-Demand (VOD) services.<sup>5</sup> There are now 260 licensed digital music services in the EU and total spending on online video transactions soared to €673.7 million in 2012, 97.1% up from 2011.<sup>6</sup>
- **The need to adapt the EU's Copyright rules must be evidenced.** The burden of proof must be on those demanding change to show its potential benefits for Europe's economy and citizens. Empirical evidence shows the content market in Europe is healthily competitive and growing at a faster rate than the wider economy.<sup>7</sup> In the **UK** for example, **employment in the creative industries increased by 8.6% between 2011 and 2012**, a higher rate than for the UK economy as a whole (0.7%).<sup>8</sup> In **France**, **culture represents an impressive 3.2% of GDP**. In **Germany**, copyright-intensive industries **contribute 4% of GDP** and represent some 1.4 million jobs. In **Poland**, 4.1% of GDP.<sup>9</sup> The undisputable economic weight of our sectors should be the basis for assessing the potential benefits for Europe of reviewing the EU Copyright rules.
- The **current Copyright Framework in Europe is flexible and constantly evolving**, be it through legislative measures such as the 2012 Orphan Works Directive and the 2014 Collective Rights Management Directive<sup>10</sup>, or through the market, where businesses of all sizes are developing creative and cultural works and services for European consumers.
- In a fast-changing global environment, **Europe's creative sectors rely on legal certainty** to underpin their **ongoing investments in developing new professional works** and innovative and consumer-friendly offers. Record companies invested €3.5bn in discovering and nurturing new artists (A&R) and marketing in 2012, equalling some 30% of their global revenues.<sup>11</sup> 1336 feature films were produced in the EU in 2011 alone<sup>12</sup> and in 2012 more than €1 billion was invested in European cinema theatres, revolutionising the big-screen experience for fans of any genre.<sup>13</sup>
- **New technologies must foster creativity, quality content and legal access**, not hinder them: copyright ensures that content creators can license their work, and so be confident in advance of making a living and a return on their endeavours.
- **Copyright is a fundamental right that promotes cultural diversity and safeguards creators' livelihoods.** The right to property, including intellectual property, is enshrined in the EU Charter of Fundamental Rights (Art. 17.2). In an EU that is founded on the principles of democracy and the rule of law, weakening the copyright framework may raise constitutional issues at both the EU and national levels.

## Creativity Works! Positions on Key Themes

### Territoriality

- As *experience goods*<sup>14</sup> and services, **creative works are conceived, created, produced and marketed to respond to specific linguistic and cultural markets and tastes**. In an EU of 28 Member States and 24 national languages (plus as many as 65 regional and minority languages), creative works need to be edited, curated, *mediatised*,<sup>15</sup> adapted and promoted separately for each cultural market. This process requires substantial investment and cultural adaptation.
- **The territorial nature of copyright allows for multi-territorial licensing** when and where appropriate in terms of the specific financial structure of each sector, the specific nature and economic viability of the works concerned, as well as market demand.<sup>16</sup>
- **Cross-border access to content is already a reality in the EU**,<sup>17</sup> when driven by consumer demand. According to a recent economic study focused on the audiovisual sector, however, the demand for foreign language TV programmes remains low and is limited to migrant populations or expatriates, representing only 3.3% of the total European population.<sup>18</sup>
- **Exclusive rights and contractual freedom are fundamental to the delicate ecosystem of creation and its financing**. They spread risk, enable different players to work together to the benefit of a diverse audience, and incentivise investment in the production of professional high-quality content.<sup>19</sup>
- **The territorial nature of copyright enables the sustainable development of the creative and cultural industries in Europe**. Moreover, the Court of Justice of the European Union has repeatedly confirmed that the principle of territoriality is recognised in international copyright law, to which both the EU and its member states are bound to.<sup>20</sup>

### Term of Protection:

- The current term of protection has become the **international norm**, the ultimate beneficiary of which is, in fact, the public domain itself.<sup>21</sup>
- The current term of protection provides for a suitable period of time during which **right holders may reap the full benefits of their works** – this is of particular importance to emerging and specialist authors and creators – while also **promoting investments** and securing returns.
- A shorter term would not be in the EU's economic interest and would undermine investment in copyrighted works by the creative sectors.

### Exceptions and limitations

- The current European system of copyright exceptions and limitations strikes the right balance. It enables respect for cultural and national diversity, flexibility and an appropriate degree of EU harmonisation.
- In the absence of compelling evidence demonstrating the need for change, the existing system of copyright exceptions and limitations should be maintained. Copyright should continue to serve the public interest by fostering incentives to create, finance, market and distribute new works and to make those works available to the public in new, innovative and compelling ways.
- Any new exception or limitation introduced to the EU copyright legal system needs to be justified by a sound economic and legal analysis.

## Exhaustion

- The Copyright Directive is very clear that “the question of exhaustion does not arise in the case of services and online services in particular” and that “every online service is in fact an act which should be subject to authorisation where the copyright or related rights so provide.”<sup>22</sup> Article 3.3 of the EU Copyright Directive further confirms that exhaustion does not apply to the right of communication to the public of works and the right of making available to the public.
- A regime of “**digital exhaustion**” based on a concept of “**forward and delete**” is **unworkable in practice** as it is not possible to verify and/or manage transfers of digital content. And in the absence of any physical wear and tear of the resold item, exhaustion would harm the business model of the copyright owner and would be incompatible with international norms to which the EU and Member States are bound.
- Digital files do not deteriorate over time like physical copies do. One **purchased digital copy could potentially be resold millions of times** on the secondary market, which would – as a direct effect – **destroy the primary market**.
- Digital exhaustion thus has no place in an environment that is increasingly founded on licensing and cloud-based services. If the online market place is to thrive, right holders must be able to manage new business models based on licensing flexibility and innovative offers. Licensed digital works and services offer exciting user experiences, for example enabling consumers to enjoy licensed copies of creative content on multiple formats and platforms.

## Respect for Rights/Enforcement

- Rights only have value if they are respected. Effective enforcement plays an important part in ensuring respect for rights. It also creates the vital certainty that underpins investment and leads to growth, jobs and the dissemination of knowledge.
- But enforcement is just one component of the solution to address widespread infringement, and a comprehensive approach is needed to ensure that property rights, access to justice, freedom of expression and data protection are all guaranteed and properly protected.

## Single Copyright Title

- A single EU Copyright Title would be a complex proposal and needs careful and long-term consideration.
- Additionally, it **could** raise competency issues. Such a **massive** undertaking as a Single EU Copyright Title **might pose problems** with regards to subsidiarity and proportionality **principles**.

## References

- <sup>1</sup> Office for Harmonisation in the Internal Market and the European Patent Office; *Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union*; September 2013; <https://oami.europa.eu/ohimportal/en/web/observatory/ip-contribution-study>
- <sup>2</sup> E-Media Institute; Audiovisual Content and Online Growth; March 2012
- <sup>3</sup> Federation of European Publishers; *European book publishing statistics*; 2012; [http://fep-fee.eu/IMG/pdf/european\\_book\\_publishing\\_statistics\\_2012.pdf](http://fep-fee.eu/IMG/pdf/european_book_publishing_statistics_2012.pdf)
- <sup>4</sup> Mobile Gaming Study, Elasticpath, 2012
- <sup>5</sup> European Audiovisual Observatory, May 2013; Alice Enders, *Progress towards Digital Europe*, 2013; International Federation of the Phonographic Industry, 2012
- <sup>6</sup> Alice Enders; International Video Federation, 2013.
- <sup>7</sup> <http://www.theparliament.com/policy-focus/culture-education/culture-article/newsarticle/europe-must-support-its-EUR800bn-per-year-cultural-sector/#.UuqACPldWfU>[http://ec.europa.eu/culture/documents/greenpaper\\_creative\\_industries\\_en.pdf](http://ec.europa.eu/culture/documents/greenpaper_creative_industries_en.pdf)
- <sup>8</sup> UK Department for Media & Culture; *The Creative Industries Economic Estimates*; January 2014
- <sup>9</sup> <https://oami.europa.eu/ohimportal/en/web/observatory/ip-contribution-study>
- <sup>10</sup> Collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market.
- <sup>11</sup> [http://www.ifpi.org/content/section\\_news/investing\\_in\\_music.html](http://www.ifpi.org/content/section_news/investing_in_music.html)
- <sup>12</sup> European Audiovisual Observatory – « Focus 2013 - World Film Market Trends »
- <sup>13</sup> International Union of Cinemas, Annual Statistics, 2012
- <sup>14</sup> *Multi-Territory Licensing of Audio-visual Works in the European Union* - Study prepared for the European Commission, DG Information Society and Media; Kea and Mines Paris Tech; October 2010.
- <sup>15</sup> Why territories matter: Vertical restraints and portability in audiovisual media services; Olivier Bomsel and Camille Rosay; October 2013 – p. 3: “mediatisation” is defined as the contextual conditioning of the expression for the consumer.
- <sup>16</sup> The book publishing sector for example has pan-European, if not worldwide, licensing. Many independent music companies grant pan-European rights through global rights agency Merlin, as well as worldwide ones where relevant.
- <sup>17</sup> Enders Analysis; *The value of territorial licensing – study*; Alice Enders; October 2013
- <sup>18</sup> Why territories matter: Vertical restraints and portability in audiovisual media services; Olivier Bomsel and Camille Rosay; October 2013 – p. 38
- <sup>19</sup> For example, in the audiovisual sector, the ability to raise financing through the sale of future distribution rights is essential to secure sufficient funds to produce new works. Case studies have shown that the contribution made by international pre-sales to a total film production budget can rise to 66%. (<http://ec.europa.eu/licences-for-europe-dialogue/en/content/wg1-presentations-3rd-round-meetings-1719-april>)
- <sup>20</sup> From Coditel to Lagardere C-192/04 or Sportradar C-173/11 more recently. Quote taken from Case C-192/04 Lagardère
- <sup>21</sup> Directive 2011/77/EU also recently extended the term of protection for performers and producers of sound recordings from 50 to 70 years, helping to close part of the gap with the US (95 years from the work’s date of publication).
- <sup>22</sup> Recital 29 of the Copyright Directive