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RESPONSE TO REFLECTIONS PAPER ON CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET

1. Executive Summary

ISFE, representing the European videogame industry, welcomes the European Commission's 'Reflections Paper' on Creative Content. The videogame industry is the fastest growing part of the European creative sector and the online game section of the industry is growing at the fastest rate. If this industry, 'born digital'¹, is to continue to develop and grow, a truly single digital market must continue to evolve, and significant obstacles, dealt with in the Reflections Paper and herein, must be addressed.

In an industry which is founded on intellectual property, it is obvious that protection of intellectual property rights is truly fundamental. ISFE would like to see more focus on this particular area in this initiative. The videogame industry is, like other industries, suffering from inconsistent and ineffective protection of intellectual property rights across the European Union. Protection of intellectual property rights online cannot always be best achieved through litigation, and this industry welcomes the various stakeholder discussions that are now under way both at European Commission and member state level especially as they have the input and participation of Internet Service Providers ('ISPs').

Civil enforcement by rights holders against online infringers has also been rendered virtually impossible in some Member States due to overly restrictive interpretations of privacy and data protection laws. In addition, existing viable and equitable online business models may become jeopardised as the legitimate collection of data in the context of online commerce is discouraged due to similar factors.

The Commission should be prepared to take legislative steps to make sure that the public interest in ensuring an adequate level of data protection is properly reconciled with other important public policy objectives such as the need to combat illegal activities and to protect the rights and freedoms of third parties. Self regulation as a partial solution in this area should also be considered. Our industry's '*PEGI Online*' Code of Conduct is continually updated and is intended to provide an efficient and potentially higher level of privacy protection to that required under law.

The growing popularity of videogames featuring music as a special or background feature is welcomed by many. However, ISFE members have begun to experience significant obstacles in clearing music rights for both on and off-line inclusion of music in videogames. ISFE therefore welcomes the interest shown by the Commission in the Reflections Paper area in seeking to find solutions in the rights clearance area. ISFE is happy to further expand on the suggestions it makes in this submission.

¹ Reflections Paper p. 8 para. 2.4.



2. Introduction

ISFE, the Interactive Software Federation of Europe,² represents the European videogame industry which produces entertainment and educational software for use on personal computers, game consoles, portable devices and mobile phones. It is the fastest growing 'content' sector in Europe, and the fastest growing part of the industry is concerned with the creation and distribution of online games.

Our member publishers distribute videogames for consumer enjoyment both on and off line and the European videogames market is now estimated to be worth approximately €10 bn ³annually. We are grateful for the opportunity to comment on the European Commission's 'Reflections Paper' on Creative Content and fully agree that *'a truly Single Market could allow retail revenues of the creative content sector to quadruple if the right steps are taken by industry and public authorities'*. ISFE represents an industry that was 'born digital' and wishes to avail of a stronger and more unified digital single market as the basis for further creativity, growth and employment in the videogame sector.

We note and approve of the central theme of the paper: how to remove fragmentation and create a digital single market by ensuring greater access to content whilst at the same protecting that content and ensuring fair remuneration for rights holders. We also agree with the three objectives identified by the Commission as requiring legislative action.⁴

Whilst we note the positive reference to the videogame industry in Paragraph 2.4⁵ of the paper we would also like to point out that, as with other industries, there remain serious issues that require resolution before this highly creative industry can fully thrive in the digital world. We will look at these issues in turn in this document.

3. Development of Videogame Industry Online

Growing Internet and broadband penetration have allowed the videogame industry to provide its game products through many new channels and business models. Legitimate downloads of all types of games are widely provided today by game publishers, console and phone manufacturers, and retailers. Many games that are bought on disc or cartridge today can be played against others using a PC or games console with Internet access.

² ISFE Membership consists of the following: Associations - AESVI (Italy), ADESE (Spain), BIU (Germany), BEA (Belgium), ELSPA (UK), FIGMA (Finland), MDTS (Sweden), MUF (Denmark), NVPI (The Netherlands), NSM (Norway), OVUS (Austria), SELL (France), SIEA (Switzerland), SPIDOR (Poland). Companies – Activision Blizzard, Atari, Eidos, Electronic Arts, Konami, Microsoft, Nintendo, SCEE (Sony Computer Entertainment Europe), SEGA, Take 2, THQ, UbiSoft, The Walt Disney Company.

³ According to *PricewaterhouseCoopers' Global Entertainment & Media Outlook 2009 to 2013*, total end user spending on video games in 2008 in EMEA was 12.08 billion Euro.

⁴ Making sure creativity is rewarded so that creators, rights holders, and Europe's cultural diversity can thrive in the digital world; Giving consumers clearly-priced, legal means of accessing a wide range of content through digital networks anywhere, anytime; Promoting a level playing field for new business models and innovative solutions for the distribution of creative content across the EU.

⁵ *'...the Digital Single Market is already a reality when it comes to video games'* (p.8).

In addition, there are many websites that offer the chance to play online games, either alone or against others. These range from simple arcade games to massively multiplayer online role-playing games, or MMORPGs, which can involve a huge number of players participating in a single game at the same time. Some such games today boast of millions of subscribers worldwide⁶.

Among the newest distribution trends in the industry is Downloadable Content (such as new episodes, characters, abilities, level maps and other enhancements) which has gained significant attention lately in both the PC and console markets. Downloadable Content is now a fixture in the industry, as publishers seek different ways to encourage players to spend more time with their game titles. Delivering Creative Content online is therefore clearly a major and ongoing focus of this industry.

4. Piracy

Internet and broadband penetration can, however, also have a negative impact. Like the music and film industries, this industry is suffering serious economic damage from widespread illicit file-sharing on peer-to-peer ('P2P') networks. In addition and increasingly these days, the threat comes via other channels, such as so-called "one-click" hosting sites or 'cyber-lockers'. Video games that have resulted from groundbreaking technological development, years of effort and investments of tens of millions of euro can now be illegally duplicated and distributed worldwide online almost instantaneously. It is increasingly a regular occurrence for new videogame software to be distributed for illegal download on the Internet within minutes of official release and, occasionally, even prior to release.

The scale of unlawful downloads is now so great, that without an effective and cost efficient solution, the damage the industry faces is very substantial. As releases of video game titles have relatively short commercial shelf lives, game piracy can have a particularly destructive effect on the sales performance of many games. Casual infringements, consisting of otherwise law-abiding people downloading pirate versions of games, are now exacting a far greater toll on the industry than in the past.

One of the 'right steps' that could be taken by industry and public authorities in creating a digital single market would be a much greater focus on the eradication of the scourge of digital piracy which destroys jobs, stifles innovation, deprives Member States of much needed tax revenue, and jeopardizes the development of an economically viable single market for digital content.

Intellectual property has been rightly recognised by the Commission as one of the cornerstones of a competitive, wealth-generating, knowledge-based society by providing, as it does, incentives to create, innovate and trade.

⁶ One online game alone, Vivendi/Blizzard's *World of Warcraft* has over twelve million subscribers worldwide.

As the Reflections Paper itself⁷ acknowledges, copyright is the basis for creativity and one of the “cornerstones of Europe's cultural heritage, and of a culturally diverse and economically vibrant creative content sector”. The creative industries have a vital role to play in reviving Europe's economy and they should be better protected by legislators from those who casually but knowingly infringe their valuable intellectual property.

4.2 Internet Service Provider (‘ISP’) Co-operation

Integral to any solution is the cooperation of ISPs across whose infrastructures copyrighted content is transmitted, and without whose cooperation any effort to address rampant online piracy is futile. The videogame industry has long supported a graduated response by ISPs to deter infringing activity on their networks (via the implementation of mechanisms allowing the suspension or termination of the Internet accounts of repeat infringers who are first given a number of warnings to desist from their illegal activity). The industry believes that this represents a proportionate and reasonable response to a very serious problem that costs the industry hundreds of millions of euro a year, and that leads to job losses and lost tax revenues right across Europe. There simply must be consequences for people who flagrantly and repeatedly infringe the copyrights of others and who violate the law.

The videogame industry very much agrees that a key solution to the growing threat to online commerce posed by piracy is a growing dialogue between the various stakeholders in the sector, and especially between rights holders and ISPs.

It is of course in the best interests of consumers, ISPs and rights holders that a secure and legitimate digital single market is created and maintained so that the optimum level of new offerings of digital content can be made available online.

In this regard we very much welcome the ongoing ‘*Roundtables*’ and ‘*Dialogues*’⁸ hosted by different parts of the Commission aimed at fostering cross-industry dialogue and agreement on the development of a safe, legal and effective online marketplace and on greatly reducing the availability of illegal content online. We look forward to these initiatives becoming more co-ordinated and allied with this particular process. Similar initiatives at national level must also be taken into account and encouraged by the Commission.⁹

⁷ Page 1 of Reflections Paper

⁸ Ms. Kroes/DG COMP’s Online Commerce Roundtable and DG MARKET’s Stakeholder’ Dialogues on the sale of counterfeit goods over the Internet, and illegal uploading and downloading.

⁹ e.g. stakeholder dialogues in Spain, UK, France and Ireland.

4.3 Circumvention Devices

The videogame industry is also plagued by the easy availability online (and offline) of circumvention devices, such as ‘mod chips’, that enable the circumvention of vital technological protection measures in game consoles and that allow for the playing on those consoles of downloaded pirate games.¹⁰ This situation is exacerbated by court decisions in some Member States holding that mod chips are not illegal under national legislation implementing the EU Copyright Directive.

4.4 Data Protection and IP Enforcement

Civil enforcement by rights holders against online infringers has also been rendered virtually impossible in some Member States due to overly restrictive interpretations of privacy and data protection laws. In Italy, for instance, the Data Protection Authority has ruled that the systematic monitoring of P2P users and the collection of their IP addresses is illegal under the Privacy Code and the EU Privacy Directive.

The Commission should be prepared to take legislative steps to make sure that the public interest in ensuring an adequate level of data protection is properly reconciled with other important public policy objectives such as the need to combat illegal activities and to protect the rights and freedoms of third parties.

Member State governments should be required to clarify the ability of rights holders to gather non-personally identifying IP addresses through appropriate tools, and consistent with the European Court of Justice decision in the *Promusicae v. Telefonica*¹¹ case, to provide appropriate mechanisms to facilitate the ability of rights holders to obtain the necessary information related to such IP addresses in order to take appropriate civil actions to protect their rights in the online environment.

It should be noted, however, that the videogame industry does not believe that such a clarification alone would be adequate to facilitate action against and to curb rampant online piracy.

Pursuing civil actions against all or even many of those currently engaged in illegal file-sharing would be time consuming, burdensome and, in the long term, quite ineffective. The videogame industry believes that civil actions against individual consumers should remain a measure of last resort.

¹⁰ Under consideration in DG MARKT’s *Stakeholder’ Dialogue on the Sale of Counterfeit Goods over the Internet*.

¹¹ *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU (C-275/06) [2007] E.C.D.R. CN1*

5. Rights Clearance

We feel that the part of the Reflections Paper dealing with Rights Clearance provides an interesting, detailed and largely accurate analysis of the subject of online music rights at Section 2.1.¹² Some of the assertions made in that section have clear relevance for some ISFE members that currently experience difficulties in clearing music rights as commercial users on a pan-European basis. We will now examine this area in detail.

ISFE members produce and distribute videogames both off and online, and recorded music is now being used in a growing number of those videogames. This use of music is in response to growing consumer, artist and record company demand. However, like other users of music, our members are encountering significant difficulties with certain aspects of music rights clearance within the European Union and especially with regard to the use of music in online games.

One obstacle to the inclusion of music in videogames is the increasing number of demands from collecting societies in certain member states, even after all necessary rights are cleared by our members 'at source' with the music author or publisher, for what amounts to a second payment for a 'license' to utilise the music concerned in the videogame (i.e. 'offline'). As the justification for such demands, some societies have referred to an 'exclusive' relationship between them and the author or publisher concerned.

For example, when attempting to market a videogame containing music in country 'X', our member company is informed by the authors' collecting society in that country that only that society has the exclusive right to license the use of music in country 'X' and that our member's music licensing agreement with the publisher or authors of that music is therefore ineffective.

We feel that this assertion of an exclusive relationship, if sustained, can only mean that a much more difficult and probably insuperable level of rights clearance will be imposed on this industry, as all music rights would have to be secured on a country-by-country basis.

The second and increasingly more serious obstacle faced by our members arises when they seek pan-European licenses for international use of music in online games. So far, our members have been unable to secure such international licenses from licensing bodies in Europe and have again been faced with the need to clear rights on a country by country basis.

¹² pp 4-6 of the Reflections Paper



Apart from fragmenting the internal market, the practices described above could also eventually lead to a situation whereby less music will be utilised within games to the detriment of all the many stakeholders who favour its use, including game players, game publishers, artists, composers and record companies.

It is our opinion that the CISAC decision¹³ of the Commission, whilst a step in the right direction, does not resolve the specific licensing obstacles faced by our member companies as explained above.

We believe that there is a precedent for the type of remedial action that may be required which can be found in the MTV Europe Complaint¹⁴ to the European Commission, where societies which collectively and internationally licensed broadcast rights in music videos were required by the Commission to replace an exclusive assignment of copyright from their members by a non exclusive equivalent. This had the effect of allowing the plaintiff MTV Europe the choice of licensing the necessary broadcast rights either collectively from the societies themselves or directly from the members of those societies, and ultimately resolved the Complaint.

We therefore note with approval that central to the Commission's plan of ensuring better access to content is the extensive consideration given in Sections 4 and 5 of the paper to current and possible future pan-European licensing models and the discussion of the concept of 'exclusivity'.¹⁵

Whilst we desire quicker and more efficient rights clearance systems, we also agree with the Commission's statement¹⁶ that '*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.*'

Of the numerous options considered which would make rights clearance easier, ISFE membership approves of the references to a 'streamlined pan-European and/or multi-territory licensing process.' The '*one stop shop*' concept should be further explored and better access to rights ownership and licence information should be ensured. In fact, we greatly welcome all initiatives by the Commission which increase the transparency of the licensing process both in dealings with collecting societies and in improving access to rights management information.

¹³ COMP/39.698

¹⁴ DGIV 1993/30583

¹⁵ p.15 of Reflections Paper

¹⁶ p.12 *ibid.*



We wish, however, to formally state our disagreement with the suggestion in Section 5.2 that Internet Service Providers could pay rights holders ‘*a form of compensation for the mass illegal reproduction and dissemination of copyright protected works undertaken by their customers...*’¹⁷

Such a solution could only grossly devalue the innovation and investment of the many creators and publishers involved in this and other creative industries.

Although the Commission has stated that it will be ‘*pro-active*’¹⁸ in seeking to achieve its listed objectives, it remains to be seen how many will actually be possible given the understandable difficulties experienced in related areas such as, for example, reform of collective licensing and rights clearance systems. We wish to state, however, that we are ready to assist the Commission in any way we can either via consultations such as this one or in bilateral meetings. We also welcome initiatives such as the recent Online Commerce Roundtable run by DG COMP mentioned above¹⁹ which is looking at issues of this type and has made statements which seem conducive to change.

6. Data Protection and Online Commerce

We note the reference to personal data at Section 4.1.²⁰ Our member companies fully understand and agree with the need for adequate Data Protection legislation in Europe. Information collected in the course of doing business should never be used for illegitimate purposes.

The Internet has introduced entirely new entertainment experiences and provides for a cost effective development and distribution channel for the rapid growth of the online videogame industry which must be allowed to continue to develop for the greater benefit of all. Existing viable and equitable online business models must not be jeopardised by discouraging the legitimate collection of data in the context of online commerce which is increasingly efficient, convenient and individually focused to the needs of each consumer.

ISFE believes that the key to better and more responsive Data Protection lies in the increased adaptation of self-regulatory privacy systems.

Our members have strict and secure privacy systems standards in place which deal with issues of data protection in total compliance with existing European Union and national laws.

¹⁷ p.19.of Reflections Paper

¹⁸ p.20 of Reflections Paper

¹⁹ at footnote 7 above

²⁰ p.10 of Reflections Paper



In addition, our industry has a pan-European Code of Conduct named 'PEGI Online' that has been endorsed and co-funded by the European Commission and that contain additional safeguards related to the privacy of the user. The 'PEGI Online' Code is continually updated and is intended to provide efficient and potentially higher levels of privacy protection than required under law.

The 'PEGI Online' Code was mentioned favourably by the Council of Europe in its Human Rights Guidelines for Online Games ²¹ and can easily be found online.²²

7. Conclusion

ISFE welcomes the ongoing focus by the Commission in seeking to ensure a true digital single market and is happy to supplement the information set out in this document at any stage. ISFE also looks forward to contributing to any related future consultation or hearing. The digital single market is of fundamental importance to this and many other European creative industries. It is in all our interests to ensure that it continues to grow and prosper

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²¹ [http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf\(2008\)008_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf(2008)008_en.pdf)

²² <http://www.pegionline.eu/en/index/id/235/>