

CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET

Reflection paper

BEUC response to the consultation

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Summary

BEUC has identified **9 fundamental principles** that need to be respected as a prerequisite to the establishment of **the Digital Single Market for content online**. In particular:

1. Global EU vision;
2. Balance of rights;
3. Development of new and innovative business models for content online;
4. Multi-territory licensing of content¹;
5. Enforcement measures for IPR infringements must be proportionate and comply with privacy rules;
6. Role of consumer protection legislation;
7. Need to safeguard consumers' privacy and protection of personal data;
8. Net neutrality;
9. Regulation and competition.

BEUC calls for EU action to facilitate the multi-territory licensing of content and supports the introduction of a system based on **extended collective licensing** as an appropriate way to simplify the clearance of rights. BEUC also welcomes the launch of a discussion on the extension of the scope of the **Cable and Satellite Directive** to content online and calls for further debate on a similar solution.

BEUC also advocates for the **integration of consumers' rights into the Copyright legal framework of exceptions and limitations**. To this end, BEUC calls for:

- the **private copying exception** to be made mandatory and drafted in a clear and sufficiently broad way to encompass acts of legitimate private copying;
- the current systems of **private copying levies** to be reformed, with the aim of enhancing transparency and fairness;
- a thorough reflection regarding the introduction of **new exception for user-created content**;
- the **facilitation of digitisation and preservation** of works held by cultural establishments;
- a debate on **alternative systems for fair compensation** needs to be launched at EU level.

¹ The UK consumer organisation Which? supports the enabling of cross-border passive sales for online content is the most effective way of ensuring that consumers can access content across the EU.

INTRODUCTION

BEUC welcomes the publication by the European Commission of the Reflection Paper on creative content online. The Reflection Paper clearly identifies the main challenges regarding the need to adapt the current EU regulatory framework to the digital environment with the aim of establishing a Digital Single Market, where authors' rights will be balanced with the general public's rights of access to content, information and knowledge. The right of creators to fair compensation for the online use of their works needs to be balanced with the recognition of a clear set of consumers' rights.

The current copyright framework fails to "keep pace" with the rapid digital developments. The phenomenon of disintermediation² that is inherent to the Internet, has called into question the "traditional" distribution system of the content and information industry, laying bare its inefficiency and its incapacity to adapt to the challenges of the digital environment.

Consumers want to have access to diverse content online, irrespective of their country of residence or their nationality. They also should be able to benefit from the establishment of a truly competitive Internal Market and get access to diversified content online of the best quality and at a fair price. Authors have the right to have their rights protected and receive fair compensation for the use of their works on the Internet. Copyright law should aim at fostering innovation and promoting innovation to the benefit of both authors and consumers. At the same time, it is important to provide the necessary incentives for the development of new business models allowing for the simultaneous distribution of content across the EU, through a simple, transparent and multi-territory licensing system.

Any discussion on the future shaping of the EU copyright framework needs to carefully balance the interests of the different stakeholders with the aim of fostering the development of innovative new business models for online distribution and the availability of online content across the EU to the benefit of the European consumer. In addition, legal certainty is a crucial parameter for the development of the Digital Single Market and the adoption of EU legislative action needs to be seriously considered.

The Reflection Paper outlines a number of options as regards concrete EU actions in the field of content online. Before providing its views on each of these options, BEUC believes that a set of key principles needs to be fully respected as a prerequisite to the achievement of a fair Digital single Market.

² Disintermediation means "cutting out the middle man". The internet makes it easier for sellers to deal directly with buyers, leading to a reduction in the use of intermediaries - that is, "disintermediation".

PART I. FUNDAMENTAL PRINCIPLES FOR CONTENT ONLINE

1. Need for a global EU vision

The current methods of distributing content on-line raise a number of challenges, including in terms of copyright, consumer protection, data protection and privacy, net neutrality, competition and content licensing. In order to ensure that these elements are integrated into the EU decision-making process, the European Commission needs to adopt a more coherent and global approach.

BEUC welcomes the adoption of a Digital Agenda in May 2009³ by the European Commission that identifies a number of priority areas where EU action is necessary with the view of establishing a Digital Single Market. The current Reflection Paper builds on the objectives set in the Digital Agenda and seeks to launch a thorough discussion on concrete proposals and options as to shaping of the future EU policy.

The creation of a Directorate General for the European Digital Agenda by Commissioner President Barroso clearly demonstrates the commitment for a coherent EU policy in the field of content online. However, it is important that the new Commissioner for the Digital Agenda also has the responsibility for the revision of the current copyright framework, or cooperates closely with the Commissioner for the Internal Market currently in charge of Intellectual Property Rights.

2. Balance of rights

Copyright law should aim to encourage creativity and innovation for the benefit of society as a whole. To do this, it needs to achieve a fair balance through the recognition of both the interests of creators and the interests of consumers. The adoption of stronger and longer copyright rules without proper assessment of the possible impact on consumers and the public interest, risks shifting the balance to the benefit of copyright owners.

Creators have to receive a fair return for their work and their creativity that would also serve as an incentive for the creation of new works. Although consumers have an interest in ensuring that innovation and creativity are encouraged, they also have an interest in competitive markets; copyright confers monopoly privileges, which restrict competition and impose costs on consumers. The adoption of stronger and longer copyright rules is detrimental to the public's access to knowledge.

From a consumer's perspective, copyright's current balance is far from perfect. In fact, many consumer usages of copyrighted content, such as the copying of digital music onto a portable device, technically infringe copyright. In these and many other cases, the law is simply out of step with reality.

The notion of users' rights is absent from the current copyright framework. A number of permitted uses of copyright-protected material are only allowed as exceptions and limitations to the copyright owners' exclusive rights. However, these exceptions and limitations are not absolute conditions and consumers often

³<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/702&format=HTML&aged=0&language=EN&quiLanguage=en>

face unclear boundaries as to which acts are permitted under the current copyright legislation.

Striking a balance between the competing interests requires the recognition of a set of clear, comprehensive and absolute consumers' rights. These should include those current limitations that are of direct interest to consumers, namely the private copying exceptions, as well as those reflecting fundamental rights and freedoms⁴. The establishment of rights should become a central aspect of the European copyright framework.

3. Foster the development of new and innovative business models

BEUC has long been calling for a thorough discussion on the development of innovative business models that would be best fitted to the online world and would respond to a clearly-defined consumer demand. BEUC regrets the fact that discussions both at EU and national level have so far focused solely on the adoption of severe and often disproportionate enforcement measures. The main challenge is to agree on a balanced approach that would enable both consumers and authors to make the full benefit of the opportunities offered by the Internet.

BEUC does not condone copyright infringement but we see it as a symptom of the lack of legitimate offers for content online. Although we believe that authors need to have their rights protected, we are confident that the establishment of a legal regime that would allow all consumers within the European Community to buy content online on a pan-European basis at a fair price has the potential to contribute to the significant reduction of unauthorised use of copyright-protected material. Where business models have been developed and tried, the results have been promising⁵. However, it is important to ensure that these business models are equally available to all consumers within the European Community.

4. Encourage the multi-territory licensing of content⁶

Despite the efforts to harmonise Intellectual Property Rights across the EU, the territorial nature of copyright has been left intact. Each Member State has its own rules regarding the granting of copyright, thus limiting their scope to their national territory. Maintaining the territorial nature of copyright and related rights in the EU is to the detriment of both consumers and commercial users alike, while it hinders the achievement of the Digital Single Market.

Consumers seeking to buy copyright protected content online are often only allowed access to online stores directed to their country of residence. Such barriers

⁴ These would include at the very least rights of quotation and criticism, a right of news reporting, a right of parody, basic scientific and educational freedoms, some library and archive limitations, and privileges for the impaired. Harmonizing European Copyright Law: The Challenges of Better Lawmaking, Information Law Series 19, Alphen aan den Rijn: Kluwer Law International 2009.

⁵ For instance, the launch of Spotify, the music streaming service, has helped curb the illegal downloading of music. Research sponsored by moneysupermarket.com has indicated that 62% of those who admit carrying out illegal downloads reckon that Spotify has helped them reduce the amount of files they are illegally grabbing. <http://www.moneysupermarket.com/c/press-releases/spotify-reduces-illegal-downloading/0007218/>; However, Spotify is only available to consumers in a limited number of Member States.

⁶ The UK consumer organisation Which? supports the enabling of cross-border passive sales for online content as the most effective way of ensuring that consumers can access content across the EU.

lead to a significant reduction of choice for consumers, particularly for consumers from the new Member States where there is a less abundant service offer⁷. In addition, territoriality of copyright may lead to price discrimination to the detriment of consumers. In fact, right holders tend to define markets along national borders and set different prices and conditions for identical products and services in each Member State⁸. For instance, a price comparison for the album 'Only by the Night' by the Kings of Leon on Amazon MP3 shows that a UK Consumer will have to pay 7.53 €, whereas a French would have to pay 9.99€ and a German 6.62€⁹.

Currently, commercial users who want to provide online content services across the EU, have to seek a license in each of the 27 Member States. As a result, commercial users are at a competitive disadvantage compared to their competitors outside the EU¹⁰. Such market fragmentation is contrary to the very notion of the Internet as a borderless environment and goes against the objective of the European Commission to establish a Digital Single Market.

5. Enforcement measures should be proportionate and comply with privacy rules

BEUC acknowledges that author's need to have their copyrights protected against infringers. However, BEUC considers the level of penalty for infringements should differ, depending on the scale of and motive for the infringement. Applying the same enforcement measures to criminal gangs infringing copyright for profit and individual consumers doing it for personal use is not fair or proportionate. Enforcement of copyright needs to respect fundamental rights, such as the right to the presumption of innocence, the right to a fair trial, the right to privacy and the right to the confidentiality of communications. Combining this with the creation of a consistent set of private copying freedoms will significantly simplify and improve the situation for both consumers and rightholders.

However, national governments under the pressure of copyright owners have been considering, and in some cases even adopting, enforcement measures that fails to distinguish between criminal entities running for profit and individual consumers, or foresees the cut-off of individual users from the Internet due to an alleged violation of copyright. Such an approach raises serious doubts as to its compliance with the European Charter of Human Rights¹¹ and the interpretation of the European Court of Justice¹².

⁷ "Refusals to serve consumers because of their nationality of residence- Distortions in the Internal Market for e-commerce transactions", Natali Helberger.

⁸ Harmonizing European Copyright Law: The Challenges of Better Lawmaking, Information Law Series 19, Alphen aan den Rijn: Kluwer Law International 2009.

⁹ Study by Matrix Insight on business practices applying different condition of access based on the nationality or the place of residence of service recipients - Implementation of Directive 2006/123/EC on Services in the Internal Market, commissioned by the European Commission, DG Markt.

¹⁰ In the US, copyright is regulated at the federal level and the constitutional rule of pre-emption does not allow copyrights or equivalent rights to exist at the level of the individual states.

¹¹ Charter of Fundamental Rights of the European Union, C 364/1, 18.12.2000.

¹² Case C-275/06 Productores de Música de España v Telefónica de España SAU (29 January 2008).

6. Role of consumer protection legislation

Most often, content is licensed to consumers through click-through or click-wrap agreements¹³ that impose restrictions on the use of content and that limit the rights granted under copyright legislation. Consumers are not always in a position to know what they can and cannot do with their digital hardware and music content.

Licensing agreements also raise a number of additional concerns from the consumer's perspective, ranging from the transparency of terms and conditions, to the fairness in contracting, the lack of interoperability of content and lack of consumer remedies in case of defective digital content.

The Copyright Directive fails to immunise the permitted uses of copyrighted content against restrictions imposed by such contractual agreements¹⁴. BEUC therefore calls upon the EU institutions to accommodate the rights of consumers in the digital world and extend the scope of the current consumer protection legislation to online content.

7. Need to safeguard consumers' privacy and protection of personal data

In the digital world, the use of certain technologies can undermine consumers' right to privacy and entail risks to the protection of their personal data. For instance, business models for the online distribution of content based on the profiling of users' data for marketing purposes should be made transparent to users and fully respect existing EU privacy rules. Today, consumers do not know that they can be paying for certain services with their personal data.

In the context of IPR enforcement, fundamental rights (such as the right to privacy and to the confidentiality of communications, presumption of innocence, due process) need to be safeguarded. Therefore, the collection of IP addresses by rights holders should only take place as a means to collate evidence to identify potential infringers. No actual names or addresses relating to that IP address should be disclosed until after authorisation has been obtained from a judge.

It is important to provide consumers with a secure digital environment that they can trust, including an effective control of their personal data. Fairness of terms needs to be improved and policy notices need to be clearly displayed in plain and intelligible language. In addition, privacy and security-by-design should be built-in the business models, the digital products and services from the very beginning as this would help comply with the principle of data minimisation, data security and foster consumer empowerment.

¹³ Click-wrap agreements are mostly found on the Internet, as part of the installation process of many software packages, or in other circumstances where agreement is sought using electronic media. They take the form of "take-it-or-leave-it" contracts, whereby the end user has to manifest his or her assent by clicking an "ok" or "agree" button on a dialog box or pop-up window, if a consumer does not accept the conditions, he/she cannot access the products he/she wants to buy.

¹⁴ Article 9 states the provisions of the Copyright Directive are without prejudice to the law of the contract. An amendment of the European Parliament stating that no contractual measures may conflict with the exceptions or limitations incorporated into national law pursuant to Article 5, was rejected by the Council. When transposing the Directive into national law, only Belgium and Portugal have given an imperative status to the exceptions by immunising them against contractual overrides.

8. Net neutrality

The question of network neutrality is closely linked to any reflection on content online and its availability to users. Consumers rely on Internet Service Providers (ISPs) to access the different types of content online and different applications. They expect that ISPs will comply with the fundamental principles of openness, inter-operability and neutrality.

However, because many ISPs are vertically integrated with owners of basic communications infrastructure, they have the technical ability to act as gatekeepers, blocking or degrading consumers' access to certain content and applications, or limiting the types of equipment that can be attached to the network. Such restrictive practices are already in place, limiting consumers' range of choices and bandwidth availability. The announcement of the CEO of Vodafone¹⁵ in November 2009 that Vodafone would prioritize Internet access for its mobile subscribers who are ready to pay an extra fee when the 3G network is congested raises serious concerns as to the conformity of such practices to the principle of Net Neutrality.

Although in some cases "discriminatory" action might be necessary for purely technical network management purposes, we strongly believe that reasonable network management practices must be narrowly defined to exclude any abusive and discriminatory practices. In a network neutral Internet, consumers should have the right to attach devices of their choice, to access or provide content, services and applications of their own and to have their access free from discrimination according to source, destination, content or type of application. In order to ensure that any network management is legitimate, providers should disclose their management practices to consumers and to national regulators who should assess these practices against the fundamental net neutrality principles.

9. Regulation and competition: Need for regulatory intervention

In a fast evolving environment, regulatory authorities need to ensure that all market players, be it commercial users or rights' administrators, comply with the rules.

Competition authorities should ensure that the online content market is not monopolised by a small number of major **content providers**. The role of competition rules should be to ensure **that consumers "do not get more of less"**, in the sense that unless the market is open to competition, consumers might only be granted limited choice, while content providers will not have the appropriate incentives to improve the quality of their services, compete in terms of prices and develop consumer-friendly business models. Competition authorities can become the gatekeepers of a fostering a well-functioning environment for content online.

Competition rules can be an efficient tool to improve the current system of **collective rights management**. Collecting societies currently have a dominant position in most EU Member States and in some cases they even enjoy a statutory monopoly¹⁶. In order to ensure that collecting societies do not abuse their

¹⁵ <http://www.businessmobile.fr/actualites/services/0.39044303.39710864.00.htm>

¹⁶ This is the case of Italy and Austria. "Collecting societies and Competition Law", Josef Drexl. See also the study carried out by the Italian Consumer Organisation Altroconsumo which provides

dominant position and that they compete in terms of quality of their services and level of administrative costs, it is essential to ensure that commercial users are able to choose a collective society in the Member States of their choice, in order to clear rights for the provision of content services either across the EU or in those countries they want to provide their services to. Within such a competitive environment, the costs for the licensing of content online will be reduced to the benefit of the end-user.

BEUC believes that **regulatory intervention** is required to ensure transparency in the operation of collecting societies. Self-regulatory measures regarding transparency and governance of collecting societies have been in place for a long time, without however achieving sufficient results. BEUC therefore calls upon the European Commission to adopt common principles and standards governing the **supervision of collecting societies** through the establishment of independent, regular and expert control mechanisms. Measures are also needed with regard to the **governance of collecting societies**. Collecting societies should make publicly available the information related to their tariffs and the level of management costs, as well as the catalogue they represent.

PART II. POSSIBLE EU ACTIONS FOR A SINGLE MARKET FOR CREATIVE CONTENT ONLINE

The Commission Reflection Paper sets a number of options with regard to the need to ensure legal certainty in the online environment. Given the diversity of the options, BEUC would like to express its vision as to which EU action is needed in the short-term and in the long-term, given that immediate solutions need to be found in order to keep pace with the rapid evolution of digital technologies.

Short-term action: Facilitate multi-territory licensing of content and integrate consumers' interests into copyright legislation

I. MULTI-TERRITORY LICENSING OF CONTENT¹⁷

BEUC strongly believes that the EU should seek to facilitate multi-territory licensing of online content with the aim of enabling consumers across the EU to get access to content of their choice irrespective of their country of residence.

BEUC acknowledges the recent efforts undertaken by the EU in this field, namely as regards online licensing of music. The European Commission's Decision of the CISAC case¹⁸ is expected to have a positive impact on the licensing arrangements of collecting societies. The Joint Agreement between the participants of the Online

examples of monopoly situations of collective societies in some Member States, available online at: http://www.altroconsumo.it/accesso-ai-contenuti/20090501/quanto-costa-la-siae-Attach_s240693.pdf

¹⁷ The UK consumer organisation Which? supports the enabling of cross-border passive sales for online content is the most effective way of ensuring that consumers can access content across the EU.

¹⁸ C(2008) 3435 final, Commission of 16.07.2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/C2/38.698-CISAC.

Commerce Roundtable¹⁹ has set a number of principles and actions to be undertaken in order to enable multi-territory licensing of content.

Nevertheless, these initiatives concern exclusively the online licensing of music. EU action is needed to establish a legal framework that would be appropriate for all types of content, despite their specificities (e.g. video/movies...).

It is also essential that any EU-wide licensing system provides for a common system for the handling of metadata. Metadata²⁰, which allows for the identification of digital content files, is essential for digital online services as well as consumers. Without it digital music collections will not synchronise properly with digital media player software. In order to enhance the transfer of data between platforms and services and ensure their interoperability, BEUC would therefore like to encourage the Commission to consider taking further action to this end.

1. Extended collective licensing

A system based on extended collective license²¹ has the potential to provide an appropriate way to solve the complexity of rights' clearance in situations of mass uses to the benefit of right-owners, users and the society at large.

This system removes the burden from commercial users to engage in costly research efforts²² in order to identify the right owner and conduct lengthy licensing negotiations. It also provides users with the certainty that they can offer content services without the risk of litigation for copyright infringement. An additional advantage of this system is that it puts those right holders that are not members of the collecting society granting the license on the same footing as the members in terms of distribution of remuneration collected²³.

To protect the interests of right owners who do not wish to participate in the collective licensing scheme, the system of extended collective licensing system should provide right owners with the option to either claim individual remuneration or to 'opt out' from the system altogether²⁴.

However, for such a system to be effective across the EU, it is essential that each national collecting society is able to grant a single license for the whole repertoire of all right holders, both domestic and foreigners. Only under this condition it will

¹⁹ http://ec.europa.eu/competition/sectors/media/joint_statement_1.pdf

²⁰ W3c Glossary defines metadata as: "Data about data on the Web, including but not limited to authorship, classification, endorsement, policy, distribution terms, IPR, and so on." Metadata can hold pricing information, author info and licensing terms. Most of the new music, image and text formats have a reserved field for metadata. Metadata can be easily attached and read from mp3, PDF, mpeg4 and HTML files.

²¹ The system of extended collective licensing has been applied in the Nordic countries and is based on the legal assumption that a license granted by any collecting society covers all the right owners and not only those that have entrusted the management of their rights to the specific society.

²² When seeking to clear rights, commercial users are confronted with the difficulty of identifying right owners. Intellectual Property Rights on the same work may be spread cross a large number of companies and individuals, thus making the clearance of rights rather difficult. This is for example the case with music works, where the reproduction and the performance right are separate and may be managed by different entities.

²³ "Creativity comes at a price, the role of collecting societies", published by the European Audiovisual Observatory.

²⁴ The Recasting of Copyright & Related Rights for the Knowledge Economy, Institute for Information Law University of Amsterdam.

be possible to establish an one-stop-shop mechanism for granting multi-territory licenses to users with a wide scope both in terms of content (global repertoire) and territory (covering the whole European Economic Area).

- Identification of copyright ownership

BEUC supports the creation of a **database** that would provide information related to ownership of copyrights, as a complementary tool that would facilitate the identification of right owners. Collecting societies have already been developing similar information systems for their repertoire that could be interconnected provided that they are interoperable. It is important to ensure open, transparent and non-discriminatory access to the information contained within this "central database". Clear rules on management and accessibility therefore need to be adopted.

2. Extension of the scope of the Satellite and Cable Directive to online delivery of audiovisual content

BEUC welcomes the launch of reflection as to whether a solution based on extension of the scope of the Satellite and Cable Directive²⁵ to online delivery of audiovisual content, should be used for the licensing of rights for audiovisual content. BEUC believes that similar solutions are worth exploring.

BEUC agrees with the assessment by the European Commission as to the advantages of such a solution, namely as regards the establishment of the digital Single Market. The introduction of a licensing system based on rights' clearance at a single country and the acquisition of a license that would cover all Community territory, similar to the one foreseen in the Cable and Satellite Directive, has the potential to significantly simplify the licensing of content. Furthermore, this system will enable small and medium size entities that are specialised in exclusively local/national or innovative repertoire to acquire in their country of establishment a license that would allow them to offer content online across the EU.

However, even if this solution is endorsed by the European Commission, appropriate solutions need to be found to ensure fair and non-distorted competition in the content online market. It is therefore important that competition authorities carefully monitor the development of the online content market to ensure that it is not monopolised by a small number of commercial users offering mainly mainstream content. In addition, the EU should further consider the adoption of measures regarding the methodology for the calculation of licensing tariffs to prevent any type of forum shopping by commercial users for the clearance of rights.

²⁵ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15, 6.10.1993

II. INTEGRATE CONSUMERS' INTERESTS INTO THE COPYRIGHT FRAMEWORK

As stated above, the notion of users' rights is absent from the current copyright framework. A limited number of permitted uses are only allowed as exceptions and limitations to right owners' exclusive rights. EU action is needed to ensure that users' rights are fully recognised and integrated within the copyright legal framework.

1. Private copying exception

The optional character of the private copying exception and the divergence in the way Member States have implemented it into national law have resulted in significant uncertainty as to its scope. In addition, alternative systems of fair compensation need to be developed, as the current system of copyright levies is not adapted to the online world.

- Scope of the private copying exception

Significant legal uncertainty arises from the fact that the Information Society Directive does not address the question of whether the private copying exception can be overridden contractually²⁶. Most often, content is licensed to consumers through click-through or click-wrap agreements²⁷ that impose restrictions on the use of content (i.e. prohibition of copies) they have legally purchased. Contractual terms that impose use restrictions that go beyond the rights granted under copyright legislation raise doubts as to their fairness. Furthermore, consumers are not provided with the necessary information regarding possible use restrictions at a pre-contractual stage and therefore their ability to make an informed choice is limited. Use restrictions can also be due to the application of technical protection measures.

Similar use restrictions may be contrary to consumers' expectations and grant additional monopoly rents to right holders²⁸ after the purchase of the content by the consumer. The Copyright Directive fails to immunise the permitted uses of copyrighted content against restrictions imposed by such contractual agreements. BEUC therefore calls on the European Commission to consider a revision of the current framework with the aim of **immunising copyright exceptions, particularly the private copying exception, against restrictions imposed by contractual agreements**, specifically end-user licensing agreements, or technical protection measures

²⁶ Article 9 states the provisions of the Copyright Directive are without prejudice to the law of the contract. An amendment of the European Parliament stating that no contractual measures may conflict with the exceptions or limitations incorporated into national law pursuant to Article 5, was rejected by the Council. When transposing the Directive into national law, only Belgium and Portugal have given an imperative status to the exceptions by immunising them against contractual overrides.

²⁷ Clickwrap agreements are mostly found on the Internet, as part of the installation process of many software packages, or in other circumstances where agreement is sought using electronic media. They take the form of "take-it-or-leave-it" contracts, whereby the end user has to manifest his or her assent by clicking an "ok" or "agree" button on a dialog box or pop-up window, if a consumer does not accept the conditions, he/she cannot access the products he/she wants to buy.

²⁸ Watt, R. (2004). 'The Past and Future of the Economics of Copyright' in Review of Economic Research on Copyright Issues, 2004, vol. 1(1): pub: Social Science Research Network.

BEUC has doubts as regards the statement by the European Commission in the Reflection Paper that “*consumer organisations argue that the private copying exception is too broad*”. BEUC strongly believes that the problem with the current exception is that it has been interpreted **too narrowly** and fails to encompass acts of legitimate private copying undertaken by consumers²⁹. BEUC would therefore ask for further evidence from the European Commission as to the source of this statement.

BEUC calls for a **clear and sufficiently broad definition of the private copying exception** to encompass acts of legitimate private copying³⁰; to ensure legal certainty, such an exception should be declared mandatory. BEUC has long supported the **recognition of a clearly defined, explicit, enforceable right to private copying**³¹.

BEUC is concerned about the efforts by rights holders to increase the total amount of copyright levies to compensate for the alleged losses of their revenues due to unauthorised use of copyright-protected material³². BEUC would like to stress that **the payment of fair compensation** is only due when consumers copy legally and **is not intended to compensate right holders for acts of illegal copying**.

- Copyright levies

BEUC strongly believes that copyright levies as a form of compensation do not correspond to the needs of the digital environment and should be progressively phased out. The more digital content consumers are able to acquire as part of licensing services, the less need there is for private copy compensation, since right holders will be directly and fairly compensated.

BEUC has recently published a discussion on fair compensation for the use of copyright-protected content, which outlines a number of improvements that need to be made to the current levies' system and aims to launch the discussion on alternative systems of fair compensation³³.

The divergence in national copyright systems leads to market fragmentation to the detriment of consumers. Due to the different levies' rates in each country, online retailers are obliged to price products differently depending on where a customer is located. Consumers thus, suffer from discrimination on the basis of their country of residence and are deprived of the benefits of the single market in terms of choice and competition.

The current copyright levies' systems lack transparency. Copyright levies are paid by consumers who are not aware that a levy for private copying is integrated in the final price. BEUC has long been calling for a visible fee, in the form of a clear breakdown of the price to be paid by the consumer, to indicate the exact amount he/she

²⁹ The Copyright Act of the United Kingdom provides for a very narrow private copy exception limited to time shifting, whereas in Belgium, private copies are limited to the family circle.

³⁰ See Fair compensation for copyright-protected material, BEUC Discussion Paper, Ref.: X/079/2009 – 22/10/2009.

³¹ Fair compensation for copyright-protected material, BEUC Discussion Paper, Ref: X/079/2009-22/10/2009.

³² According to a study published by the Spanish Internet Users Association, levies are compensating not only the loss of rights resulting from private copying but even fully covering the loss of rights resulting from piracy, providing an extra-income amounting approximately 5 million Euros annually <http://www.internautas.org/article.php?sid=1205>

³³ Fair compensation for copyright-protected material, BEUC Discussion Paper, Ref.: X/079/2009 – 22/10/2009.

is paying for the copyright levy. Consumers have an undeniable right to know what they pay for.

BEUC is concerned that there is currently little or no correlation between the impact of private copying and the subsequent economic harm and the levies collected, while in some cases the amounts collected are far above the economic harm caused by acts of legal private copying³⁴.

2. User-created content (UCC)

Technological convergence and the development of Web 2.0 applications have significantly changed the role of consumers as regards content consumption. Consumers have been engaging with the new technologies and the opportunities offered to them to the point of becoming active players in the creation and dissemination of content, information and knowledge.

The rise of user-created content (UCC) is a major component of the notion of participative Web³⁵ while it has allowed for new business models to appear and for ICT technologies to be further developed.

BEUC considers that user-created content needs to be clearly defined to ensure legal certainty. Such a definition should fall within the definition developed by the OECD, according to which *User created content is defined as content that is made publicly available over the Internet, which reflects a certain amount of creative effort, and is created outside of professional routines and practices*³⁶.

It is also necessary to make a distinction between the right to produce user-created content that includes copyright-protected material for one's own personal use, and the communication of such content to the public. In the first case, consumers are entitled to use for their private use copyrighted material to create new content.

However, user-created content is frequently shared beyond the domestic sphere, by being posted on the Internet. It remains dubious whether the current European legal framework in the field of copyright law is adapted to the needs of user-created content. BEUC believes that the current exceptions to exclusive rights are too narrow to accommodate the question of user-created content³⁷.

User created content needs to get proper protection to allow for this type of content to continue to develop. BEUC calls upon the European Commission to explore in detail the opportunities and challenges related to user-created content and define the conditions under which user-created content can be communicated to the public, when it is done for non-commercial use and without prejudice to the rights of copyright owners.

³⁴ An analysis conducted in 2003 by the Spanish Internet Users Association, for example, demonstrated that the levies applied on CDs and DVDs in Spain represent a level of compensation far above the harm caused by legal private copying <http://www.internautas.org/html/1205.html>

³⁵ Participative Web: User Created Content, Working Party on the Information Economy on the Information Economy, OECD 2007.

³⁶ *"User created content is defined as content that is made publicly available over the Internet, which reflects a certain amount of creative effort, and is created outside of professional routines and practices"*, Participative Web: User Created Content, Working Party on the Information Economy on the Information Economy, OECD 2007.

³⁷ On the contrary, in the USA the fair use exception allows for "transformative works".

BEUC would therefore call for a thorough reflection regarding the introduction of a **new exception for non-commercial use of creative, transformative or derivative works**, which reflect a certain amount of creative effort and are created outside the professional context.

3. Digitisation and preservation

Access to the information held in cultural establishments is vital for education, for creativity and for culture. Fostering access to knowledge should be a top priority for the EU in the 21st century as it will benefit all European citizens.

Under the existing copyright rules, cultural establishments are prevented from taking full advantage of the opportunities offered by digital technologies. There are a number of regulatory restrictions that prevent them from engaging in large scale digitisation of the materials in their collections³⁸, as well as legal uncertainty as to the scope of their application³⁹. BEUC believes that a clarification is needed to ensure that any type of **format-shifting and scanning that is necessary for the digital preservation of works should be permitted**. Cultural institutions should be entitled to make the number of copies that are needed for the preservation of its collections to ensure that a work is not lost or damaged

Another area of concern is related to the digitisation of content already in the public domain and whether digitisation creates in itself new rights. Despite the significant divergence in national legislations, the notion of originality generally requires some sort of intellectual, creative or personal input⁴⁰. BEUC strongly believes that the simple fact of format shifting does not achieve the required degree of originality and should not give rise to new exclusive rights over the digitised copies. Material in the public domain is an important source of use/reuse and inspiration, as well as a driver for innovation and creativity. It is important to ensure that this material is not locked up.

Finally, BEUC believes that action needs to be undertaken in relation to orphan works⁴¹ with the aim of fostering the availability of content online. The adoption of a statutory approach is preferable as it would ensure legal certainty as to the status of orphan works. Different solutions can be envisaged to tackle this issue, namely the introduction of a statutory exception into copyright legislation and a system based on extended collective licensing. BEUC has outlined its position as to the different options in its statement on the consultation on the future of Europeana⁴².

³⁸ Under the Copyright Directive, cultural institutions benefit from two exceptions: an exception to the reproduction right for specific acts of reproduction for non-commercial purposes (Article 5.2.c) and a narrowly formulated exception to the communication to the public right and the making available right for the purpose of research or private study by means of dedicated terminals located on the premises of such establishments (Article (5.3.n).

³⁹ Green Paper on Copyright in the Knowledge Economy, COM(2008) 466/3: under paragraph 3.1. Exceptions for libraries and archives, the European Commission states that the exception of article 5.2.c of the Copyright Directive does not contain clear rules on issues such as "format-shifting" or the number of copies that can be made under this exception.

⁴⁰ G. Karnell, European originality: a European Chimera.

⁴¹ Orphan works are copyright work where it is difficult or impossible to contact the copyright holder.

⁴² Europeana-next steps - Communication of the European Commission COM(2009) 440 final BEUC statement X/089/2009 - 19/11/09.

Long-term action: European Copyright Regulation

BEUC welcomes the proposal to launch a reflection on the possible harmonisation of copyright rules through the adoption of a European Copyright Regulation. The Lisbon Treaty establishes the competence of the EU to put in place a harmonised EU policy in the field of Intellectual Property Rights, including copyright⁴³. BEUC believes that the long-term objective of harmonisation of copyright rules is worth exploring and encourages the European Commission to launch a thorough discussion with all relevant stakeholders with the aim of further exploring this possibility.

The advantages of the adoption of a European Copyright Regulation may be significant. First of all, such a harmonisation will enable the establishment of the Digital Single Market for content online, as it will put in place a truly harmonised legal framework. Secondly, it will enhance legal certainty and transparency for right owners and consumers alike and greatly reduce transaction and licensing costs related to the clearance of rights⁴⁴. Thirdly, it will prevent collecting societies from fragmenting the market along national borders seeking to secure extra revenues from national licensing. Fourthly, a Regulation will give rights and limitations equal status and could restore the necessary “delicate balance” between exclusive rights of copyright owners and the rights of consumers⁴⁵.

However, BEUC is aware that the creation of a single European Copyright title, will meet the resistance of Member States, given the impact on existing national legislation. It is therefore essential that prior to engaging in such an exercise, two points will need to be clarified:

- The impact on national copyrights

In case the Community Copyright co-exists with national copyrights, this may add further burden to the current complexity of the rights’ clearance system. However, a similar coexistence will ensure that commercial users that wish to offer pan European content services can get a Europe-wide licenses, while local users that focus on national markets can equally clear rights only for the countries of their focus instead of getting wider but more expensive licenses. The role of regulatory authorities, in particular competition authorities, will be crucial to ensure that this dual system is not abused by collecting societies that will seek to maximise the benefits from the co-existence of a national and a Community right on the same work.

- The scope of harmonisation

However, a solution to the problems from the dual system of national and Community copyright might be the clear definition of the areas of law to be fully

⁴³ Article 118(1) of the Lisbon Treaty reads as follows: *“In the context of the establishment and functioning of the Internal Market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European Intellectual Property Rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements”.*

⁴⁴ K. Peifer, ‘Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen’, ZUM 1 (2006): 4, [Peifer, 2006].

⁴⁵ Harmonizing European Copyright Law: The Challenges of Better Lawmaking, Information Law Series 19, Alphen aan den Rijn: Kluwer Law International 2009.

harmonised. In order to ensure the principles of subsidiarity and proportionality, the Regulation should only regulate those aspects that are necessary for the establishment of the Digital Single Market and which cannot be left to Member States. The primary focus should be on the current set of copyright exceptions and limitations and the recognition of a clear set of users' rights⁴⁶. These should include those current limitations that are of direct interest to consumers, namely the private copying exceptions, as well as those reflecting fundamental rights and freedoms⁴⁷. The establishment of rights should become a central aspect of the European copyright framework.

PART III: ALTERNATIVE SYSTEMS FOR FAIR COMPENSATION

BEUC welcomes the commitment of the European Commission to launch an EU discussion on alternative systems for fair compensation. This launch coincides with the publication of BEUC's discussion paper on fair compensation for use of copyright protected material, in which we outline a number of reflections as regards the development of alternative systems for fair compensation⁴⁸. We would like to focus our comments on the various business models that are either on the market or are currently being discussed at national level and which seek to provide a solution to the problem of monetisation of content.

The question of monetisation of online content is crucial for new business models to continue to be developed and for authors to receive compensation. A number of models have already emerged and others are being discussed at national level.

BEUC is aware that discussions at national level have already kicked off and a number of solutions have been put forward by various stakeholders. BEUC supports any initiative that seeks to develop alternatives to stringent copyright enforcement policies and ensure a balance in the distribution of content online. However, a system developed at national level might not be best-suited to be applied at pan-European level.

BEUC believes that the **parallel co-existence of multiple business models is necessary** to keep pace with the fast evolving character of the online environment. Given that the discussion is only about to kick-off at EU level, choosing one single business model might hinder the further development of more effective models.

- Financial compensation by ISPs to right owners

Under this system, proposed by SACEM, Information Access Providers shall owe right holders a form of compensation for unauthorised mass reproductions and

⁴⁶ The Computer Programme Directive establishes the rights for users to make back-up copies, while the Database Directive allows for the making a copy without the permission of right owner. Both these provisions are not considered as exceptions, but as rights of the user that cannot be circumvented by contract. In addition, they are mandatory for all Member States.

⁴⁷ These would include at the very least rights of quotation and criticism, a right of news reporting, a right of parody, basic scientific and educational freedoms, some library and archive limitations, and privileges for the impaired. Harmonizing European Copyright Law: The Challenges of Better Lawmaking, Information Law Series 19, Alphen aan den Rijn: Kluwer Law International 2009.

⁴⁸ Fair compensation for copyright-protected material, BEUC Discussion Paper, Ref.: X/079/2009 – 22/10/2009.

dissemination of copyright protected works undertaken by their customers⁴⁹. The amount of the contribution will depend on the total volume of content illegally downloaded by users. BEUC rejects this model that goes against the current Community framework on e-commerce and the provisions on non-liability of Information Service Providers. In addition, its implementation would require the constant monitoring of the online behaviour of users and the application of filtering technologies to the detriment of consumers' privacy and other fundamental rights.

- Internet subscription fee

By means of payment of a monthly fee on their Internet subscription, users will have unlimited access to any kind of file sharing networks. The implementation of this system could provide predictability of the revenues to be collected and to be distributed to right holders. However, the application of the global licence will require that all Internet subscribers will have to bear the charge, irrespective of whether they download copyrighted protected material or not. BEUC opposes a blanked subscription fee that would equal to a tax on consumers' broadband bills. Nevertheless, ISPs can always offer their customers creative content services bundled with their broadband connection, either upon additional fee or free of charge⁵⁰. BEUC is also concerned about the risk that the endorsement of such a system will provide nothing more than short-term solutions, while it will erode right owners' incentives for developing better legal options.

- Online advertising and subscription models

Business models based on advertising and subscription services have already emerged for all types of content online. In some cases, the distribution of content is modulated differently according to the consumer' needs and the type of service he wishes to receive. For instance, the subscription fee may be higher for content received without adverts, or when it allows for the content to be used on multiple platforms⁵¹. Variations also depend on whether content is offered exclusively for streaming or for downloading as well. Consumers should be able to choose between different options.

Digital Rights Management Systems (DRMs)

The deployment of Digital Rights Management systems (DRMs) that exercise control on the use of copyright-protected content, raise serious concerns from a consumer point of view, particularly in terms of access to and use of content, privacy, transparency and fair contract terms and interoperability⁵². BEUC has stressed the need for these concerns to be seriously taken into consideration and addressed in a consumer-friendly way.

⁴⁹<http://www.sacem.fr/portailSacem/jsp/ep/contentView.do;jsessionid=KTJB2a10xN1wH2cmczf2DWMMe21knEMRXIK5DzEemttOOeCTZVjx1!1621977062?contentTypeId=2&contentId=536903599&programId=536880422&pageTypeId=536880186>

⁵⁰ TDC: More than 30 music companies in the PLAY agreement, TDC, 31 March 2008 <http://tdc.com/publish.php?id=16268>

⁵¹ An example is the launch of Deezer which provides different options to its customers, <http://www.zdnet.fr/actualites/internet/0.39020774.39710547.00.htm?xtor=EPR-100>

⁵² Further comments on consumers' concerns with regard to DRMs can be found in BEUC's discussion paper on fair compensation for use of copyright-protected material BEUC Discussion Paper, Ref.: X/079/2009 – 22/10/2009, <http://212.3.246.142/docs/1/OOHKGLCCIOGHFMMEOOCGDDNDPDBG9DBGD9DW3571KM/BEUC/docs/DLS/2009-00900-01-E.pdf>