

European Commission “Creative Content Online in the Single Market” consultation

Comments submitted by France Telecom Orange Group

February 2008

Executive summary

The France Telecom Orange Group, shares with the Commission the aim of fostering the growth of legitimate creative content online and welcomes the opportunity to comment on the Creative Content Online in the Single Market Consultation.

Consumers’ right to diverse and affordable creative content online must remain the focus of both industry and regulators.

Even if distribution of content without copy-restriction mechanisms (also known as DRM systems) start to appear for online music, DRM systems are the appropriate technology to implement most of the content online business models. DRM should remain industry-led.

The Group would recommend a stricter instrument such as a directive for multi-territory licensing.

FTOG is, and always has been, actively collaborating with programs fighting illegal file-sharing, based on legally collected evidence and respectful of customers’ fundamental right to privacy. However, we believe that the developing of a legal alternative should precede the implementation of repression programs.

Introduction

France Telecom Orange Group is one of the world’s leading telecommunications operators, with more than 170 million customers in 220 countries or territories. It has placed Europe at the heart of its international strategy: the market leader in France and Poland, a complete operator in Spain, a pivotal player on mobiles in the UK and the number one broadband internet access provider in Europe.

Moreover, with convergence of all its activities (fixed, mobile, internet) France Telecom Orange Group is becoming an integrated multi-country group. And, it has been the first in the telecom industry to address the opportunity of content across all its networks as content is clearly an opportunity of growth.

Indeed, the markets for TV and Video, Music, games and infotainment on telecom networks is quickly expanding, and France Telecom Orange Group continues to implement its strategy "Content everywhere".

Considering this context, the Group welcomes the Content Online in the Single Market Communication as we share with the Commission the aim of fostering the growth of legitimate creative content online.

General Comments

Building a diverse, user-friendly and affordable legal offer is FTOG's strategic target. Based on a convergent next generation internet access offer and new media platforms, today available on an extended European footprint, FTOG proposes creative content in a variety of advanced formats. As such, we share with the Commission the statement that access to content is the key issue.

Concerning the multi-territory licensing, improvements are necessary because Recommendation 2005/737/EC failed to deliver the expected results: except for the SACEM/SDRM-SGAE-SIAE initiative, no pro-commercial users' efforts have been made by collecting societies to ensure a true pan-European grant of their rights on online music. The new systems proposed are "one-stop-shops" only for the right-holders and not for the commercial users. Therefore FTOG would recommend a stricter instrument such as a directive in order that rights holders are able to assign their rights to several collecting societies simultaneously, so as to generate a more competitive context and give users greater negotiating power.

On management of online rights, we would like to stress that FTOG's business strategy relies on legal, secure online content offers respectful of the authors' rights. In this context, we see DRMs as the only technique available today for guaranteeing authors' rights and a much more efficient method than the iniquitous levies regime in place in most countries. Despite the industry failure to deliver interoperable DRM systems, FTOG keeps a pragmatic approach by providing a user-friendly subscription-centric offer, interoperable at service level. This is a clear example of the relevance of the convergent approach in meeting consumers needs. Therefore, we do not foresee a need for regulatory intervention in a field driven by the industry and were DRM-free offers start to appear in the market.

FTOG's business model, based as well on access as on content delivery, suffers doubly from illegal file-sharing. Therefore FTOG is in favor and actively collaborates with programs fighting illegal file-sharing programs based on collected evidence and respectful of customers right to privacy. However, unreasonable customers criminalization or the introduction of practices violating customers' right to privacy is not

an approach that we share particularly in this transition phase where new business models are still at an experimental stage and legal offers lack diversity.

Conclusion

To conclude, it is FTOG conviction that building a diverse and legal creative content online offer is the way out of the illegal file-sharing problem. Consumer demand for online content is growing, interoperable and copyright protected content technical platforms are available today. Regulatory efforts should then be focused on fostering content availability by inciting right-holders to overhaul the copyright management system in order to adapt it to the new delivering context in terms of solutions provided by the new technologies.

Finally, France Telecom Orange Group would like the Commission to consider the following responses to the questionnaire.

Digital Rights Management

1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?

FTOG notices that DRM protected offers (pay per downloading and streaming) did not boost the legal online music market. DRM systems' lack of interoperability does not permit customers to listen to a given track on the device of their choice. Moreover, right holders' position on DRM has shifted in recent months: music labels are now planning to release at least part of their catalogues without DRM and are also implementing advertising revenue business models.

However, for the time being, DRM systems remain the appropriate technology to implement the business model of commercial offers such as subscription online music, online movie rentals and pay-per-view services. DRM systems are also optimized for a specific media format, distribution mode (streaming vs. download) or consumer appliance (pc, set-top box or mobile phone).

Keeping in mind that interoperability and user-friendliness are consumers' key features, FTOG follows a pragmatic strategy based on a subscriber-centric rights management approach – namely enabling the end user to consume legally acquired content on any device or network. Therefore, FTOG believes that DRM's interoperability development is and must remain market-driven and that convergent services can provide overall interoperability and user-friendliness to customers.

The adoption of open standards, such as OMA DRM, may provide a proper answer to the interoperability issue, while confirming the advance of European technology in a booming and highly competitive industry. However, this must remain a market choice. Any attempt to favor a particular standard risks impeding investment and innovation.

Furthermore, DRM content protection systems ensure that right-holders get the exact due remuneration for their content. They constitute a suitable alternative to the policies of remuneration through levies which have proved to be inefficient, iniquitous for right-holders remunerations, and unfair for users storing their own generated content. Such policies should so be reviewed by considering that the spread of DRM protection put the legitimacy of levies at stake.

2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?

It is FTOG belief that consumers must be duly informed of their rights when acquiring legal content and that eventual limitations on services interoperability must be mentioned.

Consumer should be informed in a positive way; the message must be transparent and focused on lawful practices clearly stating for example the number of copies that are allowed, or the possibility of format shifting. Repressive communication based on assumption of eventual unlawful practices are inflated and nearly ineffective.

As consumer confidence is the key challenge in terms of operators differentiation within the market, they must remain free to decide the format and the content of consumer information. This guarantees the required flexibility and adaptation to the various offers.

3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?

End-Users Licence Agreements (EULAs) represent an important medium for consumers' communication, therefore EULAs content must remain in line with providers commercial strategy. However, legal fair-use should be highlighted instead of insisting on highlighting illegal practices.

4) Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?

Providing easy readable and complete consumer information will enhance consumer confidence to a much greater extent than introducing dispute resolution mechanisms.

5) Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?

Regulatory intervention is only appropriate where abuse of dominant position can be demonstrated.

Multi-territory rights licensing

6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

As reminded in the main body of response, previous recommendation on cross-border licensing on online music failed to have significant impact. Given the limits of soft-regulation, we are in favor of a directive that would be a more appropriate instrument to promote transparency and competition between collecting societies on the market of rights management.

7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?

At this stage it is unclear how the model proposed by the Commission would work, especially in case the rights access given by the secondary license. This proposal is not mature enough to be commented upon.

8) Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?

Any type of business models would benefit from multi-territory licenses. Efficient and cost effective rights management is the key issue that would develop this market eliminating costly territory by territory negotiations.

Legal offers and piracy

9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

Effective cooperation between stakeholders must be coordinated by an independent Authority in charge of protecting fundamental users' rights, such as the right to privacy, applying proportionate, transparent and evidence-based reprimands, and guaranteeing effective and fair competition between the ISPs.

10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to followed?

FTOG actively collaborates with lawful programs against illegal file-sharing and is willing to investigate remedies respectful of the consumers' fundamental rights. Therefore FTOG agreed to collaborate with the Olivennes initiative which is a lawful application of the "graduated response" operated under a specific independent Authority and respectful of consumers' right to privacy (no Internet filtering involved), therefore in the tradition of the e-Commerce Directive "mere conduit" principle. Operators role must remain limited to answering requests from judicial authorities concerning illicit behavior established by admissible evidence. The responsibility of operators is not to be unduly extended to include prevention of civil law infringements. In the fight against criminal activities, FTOG has always given its full cooperation to law enforcement.

The Olivennes MoU highlights the importance of the legal offer, even if a further step is needed on the VoD release window agreement, and recognizes the importance of an in depth experimentation on technology for internet filtering. A two year experimentation period will be necessary to evaluate overall legal and technical feasibility of state-of-the-art filtering technologies, their impact on network performance, scalability and costs. Furthermore, the Olivennes MoU approach is respectful of competition.

Although actively cooperating, FTOG would like to remind that regulation also needs to be socially acceptable and practically viable. FTOG regrets the timing of this agreement. In our view, boosting the building of a diverse legal offer is a prerequisite to any criminalization of illegal file-sharing practices. Moreover, “graduated response” raises concerns in terms not only of legal implications such as respect of fundamental rights of citizens but also of applications details that remain unclear at this stage. The recourse to reprimands such as the internet account termination for repeat offenders may prove to be disproportionate. One concern is to understand how such an account termination measure is to be combined with contradictory obligations it has to comply with, such as the one enshrined in the Universal Service Directive in terms of voice services provision for unbundled customers.

Illegal file-sharing is not the only illegal activity on the Internet. “Graduated response” applications, respectful of customers’ fundamental rights, may succeed in limiting the illegal file-sharing phenomenon but can pave the way to less detectable file-sharing technologies based on anonymity and encryption that may have potential appeal for serious crime, resulting in the end in even more dangerous effects for society as a whole.

It must be mentioned that “graduated response”, claimed by some copyright owners to be broadly deployed in the US on a contractual basis, is not a success: BitTorrent remains into the top 50 most consulted web sites. Also, other forms of file-sharing practices arise with the development of storage and share services.

To conclude, even if a legal “graduated response” system is to be implemented, it is likely that its impact will remain limited. The issue of fighting illegal file-sharing practices must from now on be addressed by the content industry as a whole. It implies an overhaul of the business models, in adaptation them to the cost effective distribution means available thanks to new technologies widely adopted by consumers for legitimate purposes.

The on-going discussion about proper solutions for judicial investigation against file-sharers breaching the law, must not further delay the building up of an online content legal offer and the experimentation of new advertising revenue based business models.

11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

Filtering is a form of censorship that affects the fundamental rights of individuals, including freedom of speech. Also, filtering is never completely immune to errors, and like all security technologies it is subject to a technological arms race. The debate on the eventual introduction of filtering measures is primarily a matter of societal model that goes beyond the commercial nature of ISPs.

Excluding the exception of child pornography, an area where the societal debate delivered a clear message that resulted in the successful enforcement of widely agreed filtering measures, the debate over the degree of freedom of speech and citizens privacy right didn’t deliver a clear message yet.

Therefore, the FTOG remains unwilling to set up filtering techniques aimed at preventing specific crime, such as copyright infringement, without any specific authority in charge of enforcing the law.