



Google Contribution on Creative Content Online.

29.08.2008

Google welcomes the Communication on “Creative content online in the single market” (the "**Communication**") and appreciates the opportunity offered by the European Commission to comment and provide perspectives on the different issues it raises.

A great number of promising developments are currently taking place in the field of creative content online, with the emergence of innovative business models for online distribution of traditional content, and the surge of user-driven creation. These offer a wide range of opportunities for innovation, creation and increased user access to a great diversity of content.

As highlighted in the Communication and the Commission’s staff working paper, a number of challenges remain to be addressed to make the most of these opportunities. There is a need to facilitate the development of attractive online content services at a European level, by improving access to content and developing multi-territory licensing mechanisms. The development of online content services should also aim at addressing the issue of online copyright infringement, by creating services that meet new users’ needs and expectations.

In this context, Google considers the Communication as a timely opportunity for the different players concerned to engage in a constructive dialogue on the best ways to address these challenges. We are willing to be closely associated with this dialogue and to the work of the European Commission in this field, notably through an active participation to the "Content Online Platform".

1. Creative Content Online: A fast changing environment.

As pointed out by the Communication, the online creative content market is an ‘emerging’ market in which ‘developments take place at a rapid pace’. According to the study on “Interactive content and convergence” carried out by the European Commission in the context of its work on creative content online, the interactive content market will more than quadruple from €1.8 bn in 2005, to €8.3 bn by 2010. The traditional content sectors are progressively developing their businesses in the online market, which is representing a growing part of their total revenues. Not only is this an emerging market, it is also a market in flux where new entrants exist at all levels - encompassing small independent content producers as well as innovative distributors.

The progressive move of traditional content sectors in the online environment contrasts with the rapid development of user-created content. The rise of user-created content has been significant in recent years, with user-driven creation attracting a growing number of users eager to access content, and to get involved in its creation. This leads to a major shift in users' habits, from passive media consumption to active content selection and creation. This is also creating opportunities for a more participative Information Society, and an enormous potential for creativity and availability of new content.

Any action of the European Commission should aim at creating and maintaining conditions that ensure a co-existence and synergy between the different creative models and business models for distribution of content. It should support innovation in both content production and distribution. It should not favor traditional models for creation over user driven creation or one business model over another. In this context there is a need to reconcile different interests such as copyright protection with users' self-expression and creativity, while promoting an environment favorable to innovation, creation and diversity.

2. Developing partnerships and multi-stakeholder cooperation.

Google fully supports the approach of the Communication considering that self-regulation and better collaboration between rights holders, Internet intermediaries and users, is the way forward to support the development of innovative business models and the deployment of European online content services. Self-regulation initiatives and multi-stakeholder cooperations developed on a voluntary basis to address market needs and developments are better adapted than regulation to provide timely solutions to the challenges arising in a rapidly changing environment.

The existing legislative framework, and in particular the eCommerce Directive (2000/31/EC) is setting the basis to develop such cooperation. The directive has been an important cornerstone in the growth of the varied and innovative information society markets in the European Union. It notably establishes a liability regime for Internet intermediaries representing a delicate balance between the various actors and interests involved in the value chain. By doing so, it provides for the appropriate framework to support the development of online content services, as well as users' creativity and self-expression.

Google considers that the main challenge to be addressed to foster the uptake of online content services and improve respect of copyright in the online environment is to develop content services meeting users' expectations and needs. In this context, Google is establishing a great number of partnerships and licensing agreements with rights holders to provide innovative content services, allowing users to search and access content online.

Google is notably partnering and closely collaborating with rights holders in relation to the development of the YouTube video sharing platform. YouTube is not an "online music service" or "online video service" in the commonly accepted interpretation.

YouTube is an information society service, a creative communications and entertainment platform, which allows users to share content and communicate with each other through the medium of the internet. YouTube's users may be either professional content producers (e.g. BBC, or the European Commission) or private individual users.

YouTube has developed a suite of tools that empower rights holders to fully manage their content on YouTube. YouTube has adopted this approach in line with the eCommerce Directive and gone beyond the legal obligations applying to intermediaries such as YouTube in the context of this directive, to create an environment inviting rights holders to make their content available. We provide here an overview of some of the tools developed:

- YouTube offers an automated notification and take-down tool which enables rights holders to easily search for and identify videos on the site that contain their content, and promptly remove them with the click of a mouse.
- YouTube also uses technology that creates unique identifiers of files that are removed from YouTube for copyright reasons and prevents identical files from being uploaded to the site.
- YouTube informs its users about copyright and strongly discourages infringement (in a “Copyright Tips” section of the YouTube website). It also includes clear and prominent messages concerning rights ownership at the point that end users upload user-created content, as well in its terms of use and via links to YouTube’s copyright policies on every page of its web site.
- YouTube also provides a feature called “AudioSwap” enabling users to illustrate their original videos with music that YouTube licenses from music publishers and record labels. The purpose of this is to give YouTube's users easily accessible options for being creative, and use licensed music in their creations.
- YouTube Content Management Tools: YouTube provides technology to enable rights holders to produce unique identifiers of their copyright protected audiovisual works. If such works are then identified, then rights holders are empowered by being able to decide what should be done with this content, including by monetising it.

As you can see from the above, by using innovative applications of services, YouTube is putting management of content firmly in the hands of the rights holders. New models such as the ones developed by YouTube are offering a way for users to be creative, to get access to wide range of content for free, and for rights holders to manage and monetise this access. Such services can only be developed through a voluntary cooperation between Internet intermediaries and rights holders.

3. Licensing of rights in the online environment.

As explained, Google is partnering with many rights holders to create new services allowing them to make the most of new market opportunities, at local or global level. YouTube, our most popular video hosting site, is being localised and translated into many

different languages with the intent of providing local content and expanding cultural diversity.

Multi-territory licensing is necessary to help prevent the fragmented European market from being a hindrance to the development and deployment of online content services. In this context, it is important for rights holders to fully collaborate with Internet intermediaries in developing flexible, practical and commercially viable licensing mechanisms allowing the development of online content services at European level.

4. Answer to the specific questions of the consultation.

Digital Rights Management (DRM).

Google is not in a position to comment on the best ways to achieve DRM interoperability, improve consumers' information with regard to DRM systems, or enhance the legibility of DRM end-user license agreement. Google supports interoperability as a general principle and a fundamental basis to create an innovative and competitive market for information society services, offering maximum benefits to consumers.

In this respect, Google considers that any device, application or service, should be designed with the view to achieve the highest possible level of interoperability with other devices, applications or services. Whenever limitations or restrictions of interoperability may affect the use of devices, application or services, consumers should be provided with the appropriate information on any such limitation or restriction, allowing them to make a fully informed decision.

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?

Google believes that there is a need for multi-territory licenses for online services such as YouTube, in order to allow all parties to fully take advantage of the possibilities of the online environment and the internal market. Google expects that with continuous close partnership with rights holders, Collecting Societies will develop solutions with information society services to allow for the provision of multi-territory licenses. The European Commission has ongoing Competition cases in CISAC and CELAS, the outcome of which will help establish the parameters within which collecting societies can operate in establishing new agreements, at least between themselves. If ultimately, through positive attempts by information society services and collective rights managers fail then there may be cause for legislative intervention.

To offer localised services in Member States, YouTube currently approaches each national collecting society individually. It is currently not possible to obtain a multi-territorial licence from a single European society (whether that licence be pan-European – i.e. for all 27 Member States - or a more limited multi-jurisdictional - i.e. only for those

Member States where YouTube chooses to localise its service). This process is extremely inefficient and time consuming, requiring multiple individual negotiations. Moreover, as the licensed rights are only available from one society in each Member State, the current arrangements eliminate competition and impede the development of new downstream markets. Lack of competition leads to less choice and thus consumer harm - it is EU consumers who are disadvantaged.

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?

As an information society service provider Google has observed the need for a 'one stop shop' when it comes to licensing the rights needed to operate its services in Europe. In other words Google would like the ability to obtain (from one collective rights management organisation in the EEA) a single, multi-jurisdictional license for all the major publishers' worldwide copyright music repertoire, so as to be able to offer services, such as YouTube, in those Member States where it chooses to operate. Google would like the option of a pan-European license which applies in all Member States or a more limited, multi-jurisdictional license, in the event that it chooses only to offer its services in some, but not all, Member States.

The license should cover all the rights which are needed for the licensed services which each society is mandated to license in its own territory. As set out below, in practice YouTube has encountered difficulties because not all collecting societies have mandates for all the rights needed to operate a service in its territory.

For a one-stop-shop to be exactly that, tariffs and other terms applicable under such a licence should be determined on a country of origin rate. To work on a country of destination rate entirely undermines the one-stop-shop principle as a company would still have to negotiate the country of destination rate with the collecting society of each territory in which it wishes to make its services available in. We understand that there has to be some flexibility in the country of origin rule as some slight variation in tariffs may apply due to local application of copyright law and also different rights may be required to offer a service in some member states. Any variations should strictly be limited to and referable to a difference in the rights being licensed and should be negotiable directly with the collecting society granting the multi-jurisdictional license. Otherwise differences would impede the internal market.

Given the current high level of transparency between collecting societies it is impossible to have any level of competition. Introducing the possibility of multi-territorial licensing would at least introduce some degree of competition into the market, provided the collecting societies were mandated to negotiate all terms and conditions that would apply to the licensee. Any other approach - for example, allowing negotiations over own content only, but accepting the rates for the other countries are fixed and non-negotiable -

would simply solidify national pricing and eliminate any negotiation for a significant proportion of the available content and therefore prevent competition.

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)?

Business, culture and society at large are benefiting from so called 'long-tail' content. Online availability of music, movies or books that are not available through traditional distribution channels anymore, is offering new opportunities for users to access them and creates new market opportunities. Content developed for niche markets also has the opportunity to reach the widest possible audience. Rights holders and license users alike, Google included, seek to enable the most profitable exploitation of such works. The long tail supposes that a great amount of content will reach limited audiences having been made available online at a very limited cost. Licensing the use of content on a country per country basis comes at a high cost and there is a need to lower copyright licensing costs by developing multi-territory licensing. Google considers that such licensing mechanisms should not only be developed for back-catalogue works, but for any type of works.

Legal offers and piracy

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

Google supports effective stakeholder cooperation and development of industry self-regulation to improve the respect of copyright in the online environment. In this context, Google considers that the most effective way to improve respect of copyright in the online environment is to develop innovative content services meeting consumers' expectations and needs. The primary focus of any multi-stakeholder cooperation should be to create the conditions for such services to emerge in Europe.

As illustrated in section 2, Google is already establishing a great number of partnerships with rights holders to increase online access to content. In the context of the YouTube video sharing platform, Google is also working in close collaboration with rights holders in developing a solution to increase users' access to online content, and allow rights holders to monetise this access.

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

The Memorandum of Understanding, or "Olivennes Agreement", reflects on the approach developed by representatives from the content sector and certain Internet access providers, together with the French government, to address the specific challenges arising from the development of online content services on the French market.

As for the hosting and sharing video platforms the "Olivennes Agreement", puts forward a principle of collaboration in good faith between the rights holders and these platforms. In this context, the rights holders commit to cooperate with the platforms hosting and sharing content to "make available the information enabling the establishment of the most comprehensive as possible catalogues of fingerprints". Google fully agrees with this approach and already put it in practice, considering that such a voluntary collaboration is essential. Google is already closely collaborating with rights holders to the elaboration of fingerprints database, with the view to put in place a solution allowing rights holders to fully control and have the faculty to monetise the use of their content on YouTube.

However, while the section of the Olivennes agreement on rights holders commitments calls for collaboration, one of its sentences contradicts the very spirit of voluntary collaboration and the ISP liability regime established by the eCommerce directive. The section states that there is an "obligation for [the] platforms to institute any measures aimed at combating the illegal offer of protected content online". This statement is in direct contradiction with the absence of monitoring obligation provided for by the eCommerce directive. By doing so, it not only contradicts the existing legal framework, but also questions a fundamental principle which has enabled the development of the Internet as we know it.

The agreement is based on a change of existing copyright legislation. In this context, Google expects any legislative provisions to be proposed to fully comply with relevant European legislation, and in particular the eCommerce Directive, setting the balance between the obligations and the limitations of Internet intermediaries' liability. The legislative changes to be proposed should not call into question the general principle established by the directive according to which, Member States may not impose on intermediaries obligations to monitor the third party information they transmit or host.

According to the Olivennes agreement, the legislative changes should to put in place the so-called "graduated response" under the control of a new administrative authority. The proposed system of warning and sanctioning users infringing copyright online, with sanctions escalating to the termination of Internet subscription and the prohibition to get a new subscription for a certain period, has far reaching consequences for users' and citizens' rights.

The Internet has gained a crucial importance in the daily life of users and citizens. It is not only used to access entertainment content, this is a central communication means in personal and professional life (email, VoIP, blog, instant messaging etc.). This is also an open gateway for users to access a great diversity of information and public services, and exercise their right to self-expression. Depriving users and citizens from Internet access calls into question some of these rights.

As recently recalled by the European Court of Justice in its decision *Promusicae v Telefónica* (C-275/06)[1], there is a need for Member States to ensure a fair balance between the protection of intellectual property and the various fundamental rights protected by the Community legal order[2]. In this respect, the court recalled the need for

Member States and judges to take into account the general principles of Community law, such as the principle of proportionality.

In this context, without being able to prejudge on the legislative changes that may effectively result from the "Olivennes Agreement", it is not possible to consider it as an example to follow. Such legislative changes will suppose a thorough assessment of the balance between the different interests at stake, and of the compliance with existing Community law.

Google's view is that, while users' exclusion from the Information Society will have far reaching consequences, it will not serve the purpose of increasing the uptake of online content services. As stated previously, Google considers that the primary focus of any multi-stakeholder cooperation agreement should be the creation of conditions for innovative content services to emerge in Europe. In this context, we note that the "Olivennes agreement", includes measures meant to favor the development of new services, by improving online access to content. However, they are made conditional to the implementation of the graduated response, which may further delay the development of innovative services. Google believes that multi-stakeholder cooperation agreements, aimed at developing voluntary collaboration to improve access to content and respect of copyright in the online environment, will better succeed if these two objectives are pursued at the same time, and not one made conditional on the other.

Google also notes that the report recently adopted by the European Parliament Cultural and Education Committee on "cultural industries in the context of the Lisbon strategy"[\[3\]](#), opts for an approach radically different from the one proposed by the "Olivennes agreement". The report points at the fact that "the solution should not be to criminalise consumers who do not intend to make profit out of their actions", and suggests campaigns to educate consumers and raise awareness of their responsibilities. The Culture and Education Committee "calls on the Commission to encourage and support partnerships between the cultural industries sector and the information and communication technology sectors in order to promote synergies between creativity and innovation within the context of the Lisbon strategy".

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

As previously stated, Google's belief is that the development of innovative content services meeting consumers' expectations and needs is the most effective way to prevent online copyright infringement. In this context, Google considers that business and technological innovation has much more to offer than filtering measures simply meant to block access to content. Technological developments should be used to improve users' access not to restrict it.

The evolution of YouTube illustrates how technological and business innovation can increase users' access to online content and allow rights holders to monetise this access. YouTube makes use of content identification technologies to foster online access to

content, not to restrict it. This approach creates a real incentive for content hosting platforms and rights holders to collaborate. On the one hand content hosting platforms have an incentive to develop and maintain truly efficient solutions to identify protected content. On the other hand rights holders have an incentive to collaborate to the development of such solutions, and to make their content available online.

Such collaboration can only be developed on a voluntary basis, in the context of the legal framework defined by the eCommerce Directive. The use of content identification technologies can at best allow the identification of copyright protected content that have been identified as such by the rights holders. However, they cannot make the distinction between an unauthorised use of a copyright protected content, and the legitimate use of this content by users falling under the scope of a copyright exception or a licence. Accordingly, the use of technologies to identify copyright protected content cannot give rise to a presumption of actual knowledge that would expose the liability of Internet intermediaries. Instead, the legal presumption should remain and ultimately it would be for the rights holder to provide a precise notice to the intermediary of any copyright infringing content that should be removed.

While technologies allowing identification of protected content at the level of services may be used to foster innovative content services, the application of filtering measures at the level of communication networks, may well achieve the opposite result.

The application of filtering technologies would suppose that Internet access providers actively monitor their networks. While the technical feasibility or efficiency of such a monitoring is actually doubtful and contested [\[4\]](#), the use of filtering technologies entails important risks for the development of information society services.

Packet-filtering and analysis is a process that requires a large amount of processing power and network reconfiguration. It risks degrading the quality and users' experience for perfectly legitimate online services, raising serious concerns for competition and innovation. It also risks preventing legitimate uses of copyright protected content, and negatively affects the development of user-driven creation. In addition, filtering risks imposing high cost on consumers and negatively impact on the uptake of broadband access.

Finally, there are reasons to believe that filtering will not achieve much in preventing copyright infringement online, with the ability for users to encrypt their communications rendering filters totally ineffective. Experience has proven that technical systems meant to restrict access to content, have largely failed to address the problem of online copyright infringement.

The feasibility, effectiveness, costs, or real impact of filtering technologies at the level of communications network, is subject of much speculation at the moment. In this context, Google assumes that the European Commission will not take any position on filtering, and its effectiveness to actually "prevent online infringement" before leading an in-depth and well documented analysis on its potential economic, technical and societal impact.

Such assessment should take into account the real costs, effective benefits, and actual risks raised by the application of filtering at the level of network, as well as its likely effects on innovation, creation, and the development of the Information Society in Europe.

Should you have any further questions, please contact Antoine Aubert: aaubert@google.com

[1] <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-275/06>

[2] The right to privacy in this case.

[3] http://www.europarl.europa.eu/news/expert/infopress_page/037-19264-021-01-04-906-20080121IPR19245-21-01-2008-2008-false/default_en.htm

[4] Etude de solution de filtrage de musique sur Internet dans le domaine du peer-to-peer:
<http://www.culture.gouv.fr/culture/actualites/rapports/filtrage/charte.pdf>