



Yahoo! Europe response to the European Commission Communication on Creative Content Online in the Single Market

February 2008

Introduction

Yahoo! Europe welcomes the European Commission's Public Consultation on its Communication on Creative Content Online in the Single Market and in particular the opportunity to provide our input into the policy development process.

Yahoo! Europe is committed to dialogue with policy-makers across Europe with a view to ensuring that we can contribute to the growth of the new media sector, to employment and innovation therein and to ensuring an appropriate public policy framework for all stakeholders.

Below we provide responses to the questions that the Commission has raised in its Communication. In addition, we have made some concluding remarks that fall outside the scope of the specific questions that have been raised. We look forward to working closely with policy-makers and other stakeholders and to contributing to the debate on the policy options for the new media sector.

About Yahoo!

Yahoo! is a leading global Internet brand and one of the most trafficked Internet destinations worldwide. Yahoo! is focused on powering its communities of users, advertisers, publishers, and developers by creating indispensable experiences built on trust. Yahoo! is headquartered in Sunnyvale, California. For more information about Yahoo! please visit: www.yahoo.com

In Europe, Yahoo! operates through various affiliates but primarily in the UK, Spain, France, Italy and Germany.

For more information about Yahoo! in Europe please visit: www.yahoo.co.uk, www.yahoo.fr, www.yahoo.de, www.yahooo.es, and www.yahoo.it.

General comments on DRM technology

Below Yahoo! Europe has provided answers to the European Commission's questions in relation to DRMs. Notwithstanding our answers on the specific questions, we take this opportunity to highlight our general approach and view of DRM technology.

While working with both rightsholders and other players in the value chain and respecting their choices in relation to whether they favour distributing content using DRM technology, we remain of the view that the use of DRMs has had the unintended consequence of furthering piracy and that DRM technology has been and remains harmful to overall development of the content online market. Although we recognise that rightsholders have a legitimate interest in enforcing their rights in the digital environment, we believe that DRM technology has instead pushed consumers to seek out content without use restrictions that in many instances may unfortunately infringe copyright.

In our view protecting and enforcing rightsholders' interests, in particular in relation to ensuring that they are not deprived of revenue streams from online distribution, necessitates meeting consumer demand for content without use restrictions, such as those associated with DRM technology.

In addition as technological and market developments offer the prospect of ubiquitous connectivity, consumers will be able to access their content at all times and from any device, further questioning the need for DRM technology as a means to protect and enforce rightsholders' interests.

In summary, Yahoo! believes that DRM technology has been and remains detrimental to the overall growth of legitimate on-line businesses and more generally to the development of the content online market.

Question 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?

Notwithstanding our general comments on DRMs above, Yahoo! Europe believes that interoperability between DRM systems should in theory support the development of online creative content services and the adoption of new business models by creating the necessary conditions for the legal exchange of content between currently incompatible devices and services.

The main obstacle to interoperable DRM systems has been the unwillingness of certain device manufacturers and service providers to open their DRM systems to other content distributors or device manufacturers. Yahoo! has been involved in discussions in this respect to seek interoperability for many years but has not been able to find commercial and technical solutions to overcome these challenges.

We also note that even if technical interoperability were to be established, interoperability at the consumer level can still be derailed by content providers refusing to adopt licensing terms that take advantage of such capabilities, for example by restricting the number of devices or type of devices such content might move between.

Question 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?

Yahoo! has significant experience in relation to the impact on the user experience of the use of DRM technology. Our view is that often the consumer is not sufficiently or appropriately informed in respect of interoperability or restrictions associated with the use of DRMs.

In addition, consumers will often need to rely on appropriate information from multiple different providers – for example a device manufacturer, retailer and service provider – in order to be able to ascertain if they will be able to consume content in a manner which they could reasonable expect. These multiple providers may not necessarily be incentivised to provide the consumer with all the necessary information to inform their choice and provide them with the digital experience they are seeking.

As result, our view is that consumer opinions of DRM systems are very poor. Consumers believe that DRM systems, due to their instability, proprietary nature, and their enforcement of rules which do not allow use of content for which they have paid for and legally obtained, are something that should be avoided. This negative reputation with consumers will be very difficult to overcome, and will likely itself lead to increased illegal distribution, if consumers believe that their rights to use legally obtained content are being unnecessarily restricted.

Yahoo! has first hand knowledge of this in particular in relation to digital music services where there is clear evidence of consumer willingness to pay additional fees to avoid the use of DRM technology. It is also worthwhile noting that there is no evidence of increased illegal distribution of such content distributed without DRMs.

Question 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?

In principle, Yahoo! Europe supports reducing the complexity of end-user license agreements. However, we note that in itself this is unlikely to have a substantial impact on the development of online creative content services. As noted in our response to question 2, the challenges associated with the use of DRMs are not merely about the provision of information by a single device manufacturer or service provider but are also linked to how the user can understand the range of information offered by both device and service providers and understand the likely impact of this on their media consumption experience.

Question 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?

Yahoo! Europe does not have specific views on this question.

Question 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?

Yahoo! Europe does not have specific views on this question.

Question 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?

In our submission to the European Commission's previous consultation on Content Online in the Single Market in July 2006, Yahoo! Europe highlighted the need for action to modernise the system of collective rights management for the online music.

Since then, and as a direct result of the European Commission's Recommendation on Collective Rights Management and the resulting changes in the collective rights management landscape that have taken place, we have witnessed further obstacles to the take up and growth of online music services.

We take this opportunity to re-state what we believe are the underlying issues that demonstrate the need for a Europe-wide approach to collective rights management:

- Firstly, there is no longer an underlying rationale for purely territorial licensing in the on-line environment. The on-line environment is not constrained by national borders: (1) users should be able to access services irrespective of their geographic location (2) commercial users and rights holders (or their collecting societies) are, for the purposes of determining the appropriate fee levels, able to monitor the use of a particular work, irrespective of where that work is consumed.
- Secondly, the lack of Europe-wide licensing has a direct impact on the creative sector and in particular on cultural diversity. Legal commercial services provide rights holders with a revenue stream that can be re-invested in the creative sector. This stimulates cultural diversity by ensuring that rights holders are fairly remunerated for use of their work. No such revenue streams accrue from illegal services.
- Finally, Europe-wide licensing is potentially a key element to addressing the problem of piracy. As a key input into the cost structure of commercial services, high cost or inefficient licensing places legal services at a competitive disadvantage, both in terms of cost and in terms of access to a broad range of content, in relation to illegal services.

Developments since the adoption of the Commission Recommendation on Collective Rights Management have by and large been a step backwards. The decisions by a growing majority of the major music publishers to establish new licensing structures have had the direct result of further fragmenting the licensing framework in the single market and hence leading to additional costs to music service providers such as Yahoo! Europe.

In the short term this has led to considerable confusion in the market place, with the resultant legal uncertainty as to which particular entities are authorised to represent specific repertoire. In the medium to long-term, the additional costs associated with negotiating additional multiple licenses with each of these entities will act as a barrier to the growth and development of online music services.

Whereas in principle Yahoo! welcomes the possibility of negotiating pan-European licenses, the practical impact of the Commission's Recommendation on Collective Rights Management has been to shift exclusive control, in some circumstances *de jure* and in others *de facto*, from collecting societies (exclusive territorial control) to the new joint entities between major publishers and collecting societies (exclusive repertoire control). Not only will this shift result in higher cost associated with the negotiation of additional licenses, but importantly it is unlikely to introduce any competition in the provision of the licenses themselves.

Yahoo! Europe remains of the view that the only appropriate solution to ensure growth and development of the online music sector is an approach that offers a single pan-European license covering the global repertoire offered on a competitive basis by a range of licensors.

As regards the specific issue of whether multi-territorial licensing should be addressed by means of a European Parliament and Council Recommendation, Yahoo! Europe believes that such a decision needs to be informed by the likelihood of any such option delivering an appropriate solution as discussed above.

Question 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?

Yahoo! Europe does not have specific views on this question.

Question 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)?

Yahoo! Europe takes the opportunity to highlight previous comments that we submitted in response to the Commission original consultation on Content Online in July 2006.

“Specifically, we highlight the important role that distribution and aggregation of content will play in ensuring that the end user has access to a rich variety of culturally diverse content. The new media sector by definition offers much lower barriers to distribution than the off-line media sector. At its most fundamental level, the new media sector allows content creators to become publishers in their own right. Yahoo! Europe believes that this fragmentation of distribution will act as a major catalyst for cultural diversity.”

Licensing frameworks associated with the distribution of online content are a key factor in the viability of both existing and new business models. Any steps that can be taken to improve the functioning of licensing frameworks and reduce ‘friction’ associated with developing and operating content online services further reduces barriers to entry, creates operational efficiency and hence benefits all actors in the value chain. In turn, this will create new opportunities for existing and new businesses to distribute so-called “long-tail” content. We therefore welcome any such steps as a move in the right direction.

Question 9

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

As a starting point Yahoo! Europe re-iterates its commitment to the protection and enforcement of intellectual property rights. We have a long history of working with rightholders both in relation to our commercial partnership with them but also in relation to ensuring that their intellectual property rights are respected across our business. Yahoo! is also a significant intellectual property holder in our own right.

Our business model is premised on partnership with content providers. There are many examples of such partnership in Europe: our joint venture with Eurosport, our partnerships with a range of news providers or the series of agreements we have in place with content providers from the music industry.

We are already engaged in and will continue to engage in a wide variety of activities to ensure respect of copyright.

Yahoo! Europe believes that the starting point to improve respect of copyright must be to ensure that consumer demand for online content can be met by service providers offering legitimate services. Action by both policy-makers and by individual stakeholders in the value chain, and in the context of any potential stakeholder co-operation initiatives, should focus on meeting consumer demand and inter alia include:

- Promoting a regulatory framework that favours legitimate business models, in particular that takes account of new business models and does not place them at a competitive disadvantage to their off-line equivalents;

- Promoting wide availability of content online, thereby ensuring that consumers have genuine choice between legitimate services and those that do not respect copyright. Content providers should be encouraged to make available their content on competitive terms and conditions that allow service providers to meet consumer demand;
- Continued focus on educational efforts, both by individual service providers and through co-ordinated action, to improve consumers' understanding and respect of copyright; and
- Close co-operation between all actors in the value chain to ensure effective notice and take down regimes.

Yahoo! Europe agrees that enhanced stakeholder co-operation has the potential to improve respect for copyright. Notwithstanding, the exact structure and nature of such co-operation needs to be further examined and analysed and the most effective, proportionate and balanced models for stakeholder co-operation defined. Preference should be given to stakeholder-driven, market-based, flexible, commercial and technical solutions. In addition, these may be complemented by agreements reached by players throughout the value chain in the context of stakeholder co-operation.

Question 10

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

As noted in the comments above, Yahoo! Europe is committed to the protection and enforcement of intellectual property rights. We believe that this is essential to the development and growth of content online markets in Europe.

Tackling piracy is essential to achieving this common objective. However we have serious concerns about the balance and direction of the current policy debate in Europe as to the most appropriate manner in which to tackle piracy. As noted above, we believe that the starting point for this debate should focus on the best manner in which to meet consumer demand for content online. Whereas we recognise and support that this needs to be done in a manner that respects and supports copyright, we believe that this necessitates a holistic and balanced approach, and in particular one that provides incentives for all actors in the value chain and in particular consumers to favour legitimate services and respect copyright.

Although Yahoo! Europe was not party to the discussions or a signatory of the French Memorandum of Understanding, and we recognise that there are elements of the agreement that are to be welcomed, we remain to be convinced that the agreement strikes the necessary balance to meet consumer demand, effectively address the issue of piracy and promote the growth of the content online market.

Specifically we believe that there a number of questions that are raised by the Memorandum of Understanding, including:

- Consistency with the exiting European legal framework, in particular the Electronic Commerce Directive and the liability provision therein in Articles 12-15;

- Broader social and economic questions about restricting consumer's access to the internet;
- Privacy related questions - for example about access to and use of subscriber information;
- Proportionality – whether the measures envisaged are proportionate to the desired outcomes: and
- Importantly whether the Memorandum of Understanding properly addresses the underlying issue of meeting consumer demand for content online.

Question 11

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

In general, Yahoo! Europe believes that filtering technology may provide an opportunity for reducing copyright infringement and hence support the development and growth of the content online market.

However, we believe that there are multiple legal, policy, technical and commercial considerations that need to be further understood and analysed in relation to filtering technology, in order to ensure its appropriate use and deployment. These include:

- Network level versus application level filtering – a distinction needs to be drawn between network level and application level filtering and their respective implications, from a commercial, technical and policy perspective. Yahoo! Europe is particularly concerned that network level filtering may be disproportionate to any desired policy outcomes and may have multiple potential and unintended harmful consequences, for example an adverse impact on innovation and on access to content that is legally distributed.
- Accuracy/efficiency – the technical feasibility and reliability of filtering technology is still uncertain. These constraints and related implications need to be widely understood by policy-makers. There is a need to address what appears to be a widely held view that filtering technology will provide a “silver bullet” to tackle piracy.
- Co-operation between content owners and service providers - successful implementation of filtering technology presupposes close co-operation between content owners and service providers. Optimal models for such co-operation need to be developed ensuring that operating responsibilities and costs are appropriately distributed between content and service providers.
- Current legal framework/liability – the current legal framework in Europe in relation to the liability of service providers represents a delicate and appropriate balance. The deployment and use of filtering technology should be seen as a complementary to the existing legal framework. Incentives to deploy filtering technology will be diluted, if the current liability exemptions are undermined.
- Investment in new services – requiring service providers to apply filtering technology will have significant cost implications, will act as a barrier to entry for new entrants and is likely to curtail investment in content online services. Yahoo! Europe therefore has a preference for voluntary deployment of filtering technology.
- Competitive implications – filtering technology, in particular at the network level, has the potential to have significant competitive implications, taking into account the type and volume of data that service providers might be required to monitor.

- Holistic approach – filtering alone is unlikely to provide a solution to copyright infringement. Preventing copyright infringement necessitates a multi-pronged approach involving all actors in the value chain, in particular addressing the underlying issue of meeting consumer demand for online content.

In summary, Yahoo! Europe believes that filtering technology, has the potential to support the development and growth of the content online market. Notwithstanding, we believe that deployment and use of such technology should be market driven and voluntary and that policy initiatives, including support for stakeholders co-operation, should be preceded by a comprehensive impact assessment and further analysis.

Concluding remarks

In addition to the above comments on the specific questions identified by the Commission, Yahoo! Europe would urge that the following remarks are also taken in consideration as the European Commission develops the public policy and regulatory framework for the development of the content online sector:

- Promoting a regulatory framework for electronic communications that further stimulates broadband take up and bandwidth across Europe, ensuring a competitive environment that will be a key driver for investment and innovation.
- Consistent implementation and enforcement of the current set of EU Directives, both sector specific and horizontal.
- Greater focus on “bottom-up” rather than “top down” regulatory approaches, taking advantage of new technologies and self and co-regulatory best practice.
- An evidence-based approach to policy development that makes use of both quantitative and qualitative research.
- Recognising the need for new regulatory models and approaches because of the specific characteristics of the sector, in particular the user driven nature of the sector.
- Allowing users and service providers to determine which business models succeed in the new media sector.
- Ensuring greater consistency across the range of existing and future policy initiatives, in particular as they impact on the new media sector, recognising that that the sector is at an early stage in its development and that early legislative intervention has the potential to limit growth.

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