

ETNO Reflection Document in reply to the Creative Content Online consultation

EXECUTIVE SUMMARY

The continued transition to digital modes of delivery should be based on competition and diversity. The market, as well as the regulatory framework, needs to meet the consumer's right to privacy, choice, knowledge and cultural diversity.

Exemptions to copyright are an important part of citizens' rights to share and develop knowledge. Any constraints on exemptions to copyright risk becoming counter-productive to the interactive use of online content.

ETNO supports the goal of DRM interoperability. Standards, implementation and use of DRMs should be market-driven.

ETNO supports promotion of competition between collecting societies for rights management. Each collecting society should be able to grant multi-territorial licenses.

The debate regarding illegal activities on the Internet frequently focuses on copyright. Positions are often very strong. ETNO wants to emphasize that the best way to counteract illegal file-sharing of copyrighted material is through the availability of accessible, secure and price-worthy legitimate content. In the area of copyright infringement, there is also a need for adapting court-based procedures to situations created by new technology. Access to such procedures needs to be made quicker and cheaper.

ETNO is looking with interest and care at the on-going developments in France. The current proposal, however, raises a range of issues that need to be further considered and analysed.

ETNO questions the approach of filtering for the purposes of tackling copyright infringement and asks the Commission to reconsider. Filtering is best performed at the level of the individual. Any broad use of filtering, over and above the specific case of blocking of sexual exploitation of children, would put freedom of expression at risk. ETNO believes filtering

will not lead to efficient and proportionate results for the purpose of tackling copyright infringements. Moreover, filtering risks causing negative collateral effects, such as moves towards encryption for purpose of circumventing filtering mechanisms.

INTRODUCTION

ETNO is pleased to see the European Commission has adopted a Communication on Creative Content Online which launches further actions to support the development of innovative business models and the deployment of cross-border delivery of diverse online creative content services. The Association wishes to present the following general comments along with its positions on the elements in the Annex to the Communication COM(2007) 836 final.

ETNO welcomes the EU initiative to foster the growth of creative content online. The Association is actively following the issues. ETNO believes it is in the interest of European consumers and of society as a whole to make use of the full benefits of technological developments. This includes enjoying the increasingly advanced services available on next generation networks. The continued transition to digital modes of delivery should be based on competition and diversity.

With the advent of convergence, content is a key driver for growth of our sector and the Information Society. Consumers want to use new broadband-based services to access content, any time, anywhere, using any device. In turn, new media platforms are offering tremendous opportunities for the distribution of legitimate content or other information society services. The Information Society in general is built upon the ability to share content and to interactively develop ideas and facts online. Any restrictive practices by rightsholders and slow development in licensing models will inhibit the creation of new legal content services.

The market, as well as the regulatory framework, needs to meet the consumer's right to choice, knowledge and cultural diversity. Interoperability of content and devices is core to this consumer choice. The consumers' right to privacy, as well as the right not to be unreasonably criminalised or stigmatised, needs to be fully taken into account.

In a rapidly-changing sector of ICT which is characterised by multiple uncertainties, it is important that any policy interventions or initiatives are evidence-based, properly targeted and in full conformity with the subsidiarity principle.

ACCESS TO CREATIVE CONTENT

Online content markets are growing at considerable speed, as the Commission points out in its press-release¹ presenting its Communication. This continued growth is a basic prerequisite for challenging and eventually reducing illegal file-sharing. The aim must be to meet customer demand for price-worthy, secure and user-friendly services - to develop new attractive business models such as for downloading of music and film. Together with rights holders, ETNO member companies explore new market possibilities to deliver content. Such new business models must be allowed to compete with traditional media on an equal footing, such as where rights clearance is concerned.

Any initiative that satisfies consumer demand, enhances consumer welfare and promotes accessibility to legitimate online content is largely supported by ETNO.

ETNO wants to highlight that the lack of access to creative content and lack of active licensing of rights on new platforms remain major obstacles for the development of online content services.

Exemptions to copyright are an important part of citizen's right to share and develop knowledge. Any constraint to such rights risks hindering the use of electronic content, including creative content on-line.

COMMISSION PROPOSAL FOR A PLATFORM

The Commission is setting up the "Content Online Platform" to discuss issues related to the online distribution of creative content. ETNO considers that a dialogue is essential between all stakeholders across the content on-line value chain to identify the remaining barriers to the circulation of content over new media platforms. This is why ETNO has already sponsored discussions and workshops with all major stakeholders.

ETNO is eager to participate and contribute to the Platform.

SPECIFIC QUESTIONS raised in the Annex to the Communication

Digital Rights Management

ETNO supports the goal of DRM interoperability and transparency as to make DRMs viable in the market. Standards, implementation and use of DRMs should be market and innovation-driven - not imposed.

DRMs need to find general acceptance as enablers, not disablers, i.e. to find general acceptance as means to ensure and enhance consumer choice and competition. ETNO believes interoperability and user-friendliness are core features. Interoperability in this context means the ability of users to consume content on the device of their choice, irrespective of its source. User-friendliness

¹ IP/08/5

means simplicity, availability and proper consumer information with regard to usage-restrictions and interoperability.

Before specifying any activities or line of direction regarding the role of DRMs the Commission should take into account that various large corporations already are testing other models for distribution of online content with some success. Large players in the music industry are deliberately moving into a DRM free environment.

DRMs should not be used in parallel to remuneration through levies which would unnecessarily raise the price of digital content and services.

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?

No, the development should be market-driven. The market is best suited to identify and possibly also overcome obstacles. Lack of interoperability resulting from incompatibilities between open standards is not a matter for public policy intervention. Any attempt to favour a particular standard risks impeding investment and innovation.

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 can be presumed that users have a reasonable interest to have easy access to information as to what extent a certain service is interoperable with other services or not and to what extent the service has personal data protection features. By improving DRM transparency (e.g. providing consumers with a clear description of compatible products/platforms etc) the consumer is able to choose the most appropriate solution for his/her personal needs. Therefore, proper consumer information is recommendable but the format and extent of information should be based on user demand, i.e. be market-driven.

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?

Reasonable and simple EULAs are absolutely useful and should be market-driven.

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?

The consumer's lack of confidence in new products and services with DRM systems is rather linked to technical reasons (e.g. incompatibility with the consumer's hardware or formats) than to legal consequences.

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?

DRM systems must not be allowed to transfer complete control to single market players regarding the way digital content is used and distributed. Intervention, however, is only appropriate where abuse of a dominant position can be demonstrated.

Open standards and interoperability, defined by industry and driven by user-demand and competition as well as investment, are the most important prerequisites to broaden the access to DRM solutions.

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?

ETNO supports promotion of competition between collecting societies on the market for rights management. Each collecting society should be able to grant multi-territorial licenses.

For effective rights clearance in the European Information Society it is important that rights can be cleared for many or all countries within the EU in an effective and simple way, such as through one contract.

Current procedures for rights clearance are time consuming and expensive. As a result, the growth and availability of new Internet-based content services in the EU - such as web-casting or on-demand downloads - are not as widespread as they are in the US. Rightsholders and consumers alike would benefit from the availability of additional distribution channels, and consumers would ultimately benefit from lower prices that would result from more effective competition among collecting societies.

It is important for on-demand-platforms to have the possibility to acquire global- (or multi-) repertoire licenses on a one-stop- and blanket license basis.

In an ideal world licensing models should combine both global-repertoire and multi-territory licenses. The existing global-repertoire and "one-stop-blanket-license" model provided by collecting societies is, however, strongly endangered by rights withdrawal activities of major music publishers. Such withdrawal initiatives lead to a fragmentation of repertoire and rights which make it even more difficult for content platforms to clear the necessary rights in the music repertoire and audiovisual works offered on such platforms as it necessitates additional negotiations.

ETNO supports the Commission's efforts to introduce transparency into collecting societies through the 2005 Recommendation on cross-border

licensing, even if this effort was limited to music on-line and overall failed to impact the market.

ETNO redommends an intervention more stringent than a simple recommendation to improve the reciprocal agreements between the collecting societies in a way which allows each collecting society to grant multi-territory licenses. This would foster competition between collecting societies.

Arrangements for multi-territory licensing and opening of markets for competition among collecting societies need to be accompanied by competition law safeguards.

Furthermore, regulation for multi-territory licensing should be harmonised for all types of content.

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?

The most efficient way to foster multi-territory rights licensing would be to guarantee to intermediaries (carriers, ISPs) and right owners the freedom to negotiate full rights in any EU Member State under a fully competitive scenario. Any form of establishing fees unilaterally by copyright owners or collecting societies means supporting the current non-flexible situation, which is detrimental for end users.

Major problems in the rights clearing process basically arise with regard to music works embodied in music recordings and films. In some of the license agreements, the licensors do not grant licenses for the music works embodied in the films and thus seek to acquire these music rights from the competent rights owners (e.g. collecting societies). This process of music rights acquisition in the area of VoD-exploitation faces the same difficulties as described in the answer to question 6) so that we refer to the above answer. In our view the most efficient way of fostering multi-territory music rights licensing in the area of audiovisual works would be to grant pan-European licences on the basis of improved reciprocal agreements between the collecting societies.

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)?

Yes, ETNO believes that any and all type of business models would benefit from multi-territory licenses.

Legal offers and piracy

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

In line with views expressed by consumer organisations such as BEUC ETNO wants to stress that the best way to counteract illegal file-sharing of copyright protected material is the availability of accessible, secure and price-worthy legitimate content. Along with the growing and converging market for on-line

content, user-friendly business models evolve based on bilateral agreements between commercial players.

While ETNO recognises that the rights of intellectual property owners need to be enforced. 'Piracy'², i.e. illegal file-sharing, is not in the interest of ETNO members. ETNO is concerned that some proposals seem more concerned with shifting the costs of enforcement from rightsholders to ISPs. In other words, ISPs are being asked to provide a service to rightsholders. It follows that if a graduated response is to be discussed at all, it is necessarily a matter for commercial negotiation rather than industry charters.

ISPs do not presume the single user, i.e. their new or existing customers to be infringers of copyright or any other law. The societal need to inform of what is illegal is a general duty and not something that concerns copyright only.

In the area of copyright infringement, there seems to be a need for adaptation of court-based procedures to handle the situation created by new technology. Access to such procedures needs to be made quicker and cheaper. ETNO assumes that this is primarily a matter for national authorities who need to accept their responsibility in this matter. It has to be made clear that as matter of principle, it is not the ISPs as conveyors of data that can be assigned any ex-ante responsibility to control and intervene in case of possible infringement of copyright. All responsible actors are prepared to take any steps to handle infringement as requested by specific competent judicial authorities in line with relevant EU legislation.

In this context it should be noted that there is a wide range of different kind of illegal file-sharers. The same regulatory approach might not be the best approach for all of these kinds of behaviour and categories of users.

Discussion of this topic also needs to avoid confusing two separate issues:

- the extent of ISP cooperation that is required by the public interest and
- the extent of ISP cooperation that is required by rightsholders' interests.

Two comprehensive debates on the first issue have already been carried out at the EU level. The consensus reached at the conclusion of these debates is reflected in the provisions of the E-Commerce Directive and the IPR Enforcement Directive. These provisions acknowledge that the interests of rightsholders need to be balanced against other considerations: e.g., the rights of law-abiding telecoms users, and society's need for an open "common carrier" electronic communications platform.

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

ETNO takes note of the on-going developments in France and the basic principle in the French solution, that access-providers are not to identify

² 'Piracy' is the term often used when discussing unauthorised reproduction and distribution of copyright protected material online. We should avoid the term 'piracy' as it is stigmatising, presuming that all consumers have illicit intentions as a standard in their behaviour when they surf the Internet.

which subscribers have committed crimes and which remedy should be applied in a specific case. Nor should access-providers be imposed any costs due to litigation between rights holders and their customers.

The French model which is still a proposal which will need to be considered by the national legislator highlights, however, a range of issues that need to be further considered and analysed, such as;

- If users would choose to act anonymously on the Internet all types of illegal activities, including copyright infringements, risk becoming more difficult for Authorities to investigate.
- Would an ISP's matching of a customer name and address to an IP address, even where the customer's name and address is not disclosed to a third party, be considered as a violation of data protection laws? Furthermore the IP address does not provide clear evidence on the identity of the alleged copyright infringer. For example many customers do not configure their WiFi wireless access point in a way that it blocks access to others within a radius of about one hundred meters. On top of that there are several possibilities how a third party could fraudulently use an IP address.
- Which entities and industries will submit cases to the proposed authority, other than well-known collecting societies?
- Which are the responsibilities and consequences (financial and other) in cases of wrongful requests and decisions?
- Is there a risk of exposure of innocent users and, in relation hereto, liability claims and negative publicity?
- Would a customer be deprived of all services, including fixed telephony and IP-TV if found to infringe copyright to any extent?
- Shouldn't the system distinguish between commercial and non-commercial breach of copyright legislation?
- How substantial are the resources needed for verification of requests?
- What would be the practical impact on piracy levels, in the global market-place? Will there be an independent impact assessment regarding the economic need for such a measure?
- How will a solution such as proposed in France or other specific national interpretations affect service (network, content SPs?) providers operating across borders?

Furthermore, the proposal clearly risks punishing the Internet Service Provider who has not committed the copyright infringement. Against this background ETNO would like to reiterate the principle of proportionality

when defining the appropriate remedy for an infringement having taken place.

When considering measures to black list users and disabling individuals to connect to any ISP and any Information Society service, ETNO wants to stress that such a measure counteracts efforts by the Commission to tackle the digital divide. The Internet and more specifically access to Internet services represent a key information resource in today's knowledge-driven society. Any broader denial of access to Internet services bears the risk of excluding EU citizens from knowledge and knowledge transfer. It is therefore questionable how a non-proportionate approach would contribute to the goal of a prospering European Information Society. ETNO would also like to draw the Commission's attention to the principles of universal service as established by the Universal Service Directive (Directive 2002/22/EC). Universal service ensures that every EU resident can access basic communications services, including voice communications and a connection to the Internet, at an affordable price. In practice, it means that everyone with a reasonable request can have access to these services and the Directive doesn't foresee any exclusion from these services.

In ETNO's view, the risk of exposing innocent users is particularly high due to the various existing methods allowing the abuse of IP addresses which are used to identify the user. Such practices include 'spoofing', whereby it is possible to falsify the IP address from which the traffic originates, or using compromised computers as a proxy without the owner's knowledge. As mentioned, an unprotected wireless network can also be used anonymously by others than the subscriber, without his knowledge or approval.

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

Filesharing per se is a legal activity. It is used by popular legal content applications such as BBC's iPlayer, World of Warcraft, etc. Blocking filesharing, as has been suggested by some stakeholders, would therefore adversely impact the accessibility of legal content.

ETNO asks the Commission to think again and questions the approach of filtering for the purposes of tackling copyright infringement. Filtering is best performed on the level of the individual. Any broad use of filtering over and above the specific case of blocking of sexual exploitation of children would put freedom of expression at risk.

Basic criteria when discussing filtering/blocking as to illegal file-sharing are;

- If parties A and B want to communicate - they will.
- Users want to share files, not commit crimes. There is a legitimate demand for file-sharing, not for illegal file-sharing.
- Filtering/blocking would curtail existing consumer rights including privacy.

- Filtering techniques would be a breach of Art. 15 E-Commerce Directive stipulating that Member States shall not impose a general monitoring obligation on ISPs.
- Filtering techniques usually have undesired side effects which decrease service quality and availability.
- The effectiveness of filtering/blocking has to be questioned as all currently known filtering techniques can easily be bypassed e.g. by encryption.
- If filtering/blocking is introduced as a legal requirement then courts will need to judge whether a particular technology is good enough.
- Filters are not readily implementable from one country to another, as they necessarily have to comply with legal standards of the specific state where they are implemented.
- The implementation, maintenance and continuous development of filters would be associated with significant costs. Such costs must be borne by those asking for their implementation.

Finally, ETNO wants to restate in summary that ISPs, in providing Internet access, cannot;

- Choose who should be 'authorised' to issue / not to issue notices to customers
- Define what is illegal or not
- Handle personal data regarding crimes
- Take responsibility for wrongful filtering/blocking
- Judge legitimacy of content in a framework of private enforcement of law.