

Consultation by the EU Commission on Creative Content On-Line

A Response from The European Alliance of Listeners' and Viewers' Associations (EURALVA)

The European Alliance of Listeners' and Viewers' Associations (EURALVA) is an independent and non-sectarian alliance of national associations which represents the interests of listeners and viewers of broadcasting and new media services which can be received in member states of the Council of Europe. The objects of EURALVA are to represent the interests of listeners and viewers at both European and international level in whatever way the Alliance considers to be appropriate. In particular, but not exclusively, it champions media which serve citizenship by

- Advancing the right of citizens to receive audiovisual media which serve the public interest;
- Promoting the free flow of ideas for everyone, including access to impartial news and information, in order to maximise their democratic, social and cultural potential;
- Supporting the right of all citizens to express themselves in public dialogue which is respectful of diversity and pluralism;
- Co-operating with civil societies and regulators in Europe and Worldwide;
- Liaising with responsible media organisations which support the development of informed democracies, and which treat and portray all citizens fairly.

The Headquarters of the Alliance are situated in the United Kingdom (<http://euralva.org/>), and it currently has Member Associations in seven European states, as well as exploratory contacts in ten further States, which have either recently joined, or are current applicants to, the European Union. In addition, EURALVA has Associate Members in two non-European countries, Australia and Canada.

Executive Summary

1. EURALVA notes that the number of Video-on-Demand (VoD) Channels rose from 148 to 258 during 2007, and that many broadcasters are now making their programmes available on a free-to-air basis. There is therefore no necessary connection between the introduction of fully interoperable DRM service and the development of online creative content services. Moreover, the business model developed by broadcasters and by public service broadcasters in particular, offers producers more financial certainty, and therefore more creative freedom, than a business model which is based on the introduction of DRM systems.
2. Despite its concern that the Commission has ignored the contribution which public service broadcasters have made to the development of VoD services, EURALVA nevertheless recognises that the introduction of a fully interoperable DRM system would allow producers of cinema films, DVDs and CDs to offer their works on-line in return for direct payment by the consumer. But since pay-services will have to exist alongside free services, EURALVA considers that both types of VoD service will have to be available on the same platforms. Moreover, consumers will also expect that any DRM system which is introduced will have to be interoperable with all makes of computer software.
3. Operators of DRM services must provide consumers with a guarantee that their personal data will remain confidential. There are two aspects to this. First there must be no sale or transfer of the data to third parties; and second, the data must be secured against loss or theft. These guarantees must be established by law, since not all operators of DRM systems will necessarily sign up to a commercial code of practice.
4. End-user licence agreements should be simplified and made more legible. In particular they should not deprive the consumer of the rights to make fair use of copyright-protected works within his own Member State.

5. An alternative dispute resolution mechanism would only really enhance consumer confidence in new products and services if it were to be available in the consumer's own Member State.

6. Access to DRM solutions, as with access to satellite broadcasting platforms, should either be managed by the public authorities, or allowed by the DRM operator *on a fair, reasonable and non-discriminatory basis*. There should also be common EU-wide regulatory guidelines on what financial and other arrangements are considered to be fair and reasonable.

7. EURALVA supports the introduction of multi-territory rights licensing, which is analogous to that which exists for CDs and DVDs. However, it doubts whether a recommendation to the European Parliament will be sufficient to achieve this. Moreover, it does not see as a distinction between primary and secondary markets as being especially valuable in achieving the desired result.

8. Although nearly all DVDs and CDs have multi-territory rights licences, there is no empirical evidence to suggest that back-catalogue works which are available on a multi-territorial basis are more widely available than those which are not, for example when played on radio or shown on television.

9. Users of VoD services are stakeholders in VoD services, along with producers, DRM operators and broadcasters. There is little evidence that DRM operators and producers have really consulted consumers about the types of DRM services that they want to see introduced. They seem to regard most consumers as potential pirates, rather than stakeholders.

10. Moreover, EURALVA does wish to follow the Memorandum of Understanding which has recently been adopted in France. By setting up an Internet Authority which is designed to suspend or cut access to the web for those who illegally share files, the law appears to blur the distinction between those who are accused of illegally sharing files, and those who have actually been found guilty of doing so.

Policy/Regulatory issues for consultation

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?

EURALVA considers that while the adoption of interoperable DRM systems may support the development of online content services in the creative market, there is no necessarily direct connection between the two activities.

According to the European Audiovisual Observatory, at the end of 2007 there were 258 Video-on-Demand (VoD) channels in operation in 24 European countries, compared with 148 a year earlier. The upsurge in the number of services mainly arose because television channels have now established web-sites offering free catch-up TV, which allow viewers to access certain programmes, notably episodes of series for a period of seven days after their first transmission. France (32 VoD services), Netherlands (30 VoD services), and Germany (26 VoD services) account for almost a third of Europe's VoD services.¹ Thus many online creative content services are already available on a free basis. Viewers effectively pay up front for these services in one of three ways: (a) As part of their television licence fee or through their taxes which finance public service broadcasters (b) in the increased costs which they pay for goods and services which advertise on TV, or (c) as part of their subscription for a subscription television service. These modes of payment have the advantage that they reduce, or even eliminate, the financial risk that each programme may not recover its production costs, and therefore permit a more open context in which creative content can flourish.

On the other hand, creative content can also flourish where the business model is essentially that of the film industry, or the music industry. In this model major corporations, predominantly trans-national, or American, corporations invest large sums of money into production up-front, and hope to recoup both their investment, and large profits from sales to the public, for example through sales of cinema tickets, DVDs, or CDs. For creative works of this nature, pay VoD services, which are dependent on Digital Rights Management (DRM) may provide replacement revenues for lost revenues from the decline in sales of cinema tickets, DVDs, or CDs.

Clearly both free VoD services and pay VoD services will have to co-exist in the future. Users will therefore wish to choose the best offerings from both services. To some extent, the market will be price sensitive, and users may therefore prefer the free VoD services. But on the other hand, the market will also depend on the quality and the reputation of individual works which are available via a pay VoD service, and to a significant degree this will depend both on the

¹ Council of Europe Press Release, *Number of VoD services in Europe grew remarkably in 2007*, Strasbourg, 19 February 2008, http://www.obs.coe/about/oea/pr/vd2008_update.html

marketing strategy of the producer of the individual programme, and its critical or cult reputation.

But with pay VoD services, there is a third consideration. This is the relationship between the DRM system, and the computer operating system used by the individual user. For instance, some DRM systems, in which the downloaded programme self-destructs after 30 days, can only be received on a computer with a Microsoft operating system. Other DRM systems may require the user to buy a computer in which a particular type of software has been installed by the provider of the DRM system. Thus to make matters even more complicated individual viewers may only choose – or even be able – to access those DRM systems which are compatible with the operating system on their own computer

EURALVA would therefore argue that one of the main obstacles to the adoption of fully interoperable DRM systems is the free market approach which Europe is allowing to develop in the field of DRM. A good way in which to start to remedy this situation would be for the Commission to persuade both the European Parliament and the Council of Ministers to require their State-aided public service broadcasters, and other official bodies involved in the financing or production of VoD services, to ensure two things:

- (a) any VoD platforms which they use can carry both free VoD services and pay VoD services; and
- (b) any DRM systems carried on that platform are fully interoperable.

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?

Yes, both consumer information and personal data protection of DRM systems need to be improved.

First, the consumer should be able to access both free VoD services and pay VoD services, but the consumer should NOT be required to access a pay VoD platform in order to access a free VoD service. Thus DRM systems should be an add-on to a free access VoD platform, and consumers should not have to access a free VoD service via a pay VoD platform. If this were so, they would be forced to provide that platform with personal data in order to access the free service.

Secondly, the consumer should have the right to be assured that any personal data which has to be provided to the VoD platform operator will be properly protected. This would preferably be achieved by law, as it is doubtful whether every platform operator would sign up to an EU-wide code of conduct. Consumers' personal data would need to be protected in broadly two ways. First, there should be a prohibition against the DRM operator from selling or transferring the data to a third party for their sales, publicity or marketing

purposes. Secondly, the DRM would have to put in place a security system, backed up by appropriate insurance arrangements, which ensured that no personal data could either be lost or stolen. Moreover, consumers should be indemnified by the DRM operator against the loss or theft of any their own personal data.

Thirdly, there should be a standard set of conditions which is designed to protect the consumer, and which are included within the consumer information panel. In particular, before any transaction occurs, the consumer should know in advance the cost of the whole transaction, and the number of digital bits involved in the transaction, in order that he/she can estimate how long that particular transaction would take to download. This information should be available in every recognised EU language.

Fourthly, as provided in the Audiovisual Media Services Directive, the user should be provided with proper labelling about any product placement before having to decide whether or not to download the programme.

Fifthly, the DRM system should also provide the age-classification certificate of the host Member State for the VoD programme, and where known, those of other Member States in which the programme can be downloaded.

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?

EURALVA agrees that it would be beneficial both to reduce the complexity and to enhance the legibility of the End-user licence agreement. But while this might improve the on-line delivery of any creative content, we doubt whether this move would actually *support the development* of any creative content. Furthermore, any such EULA should not over-rule the fair use provisions which are already extant in the Member State of the end-user.

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?

Most, if not all, consumers would not examine the dispute resolution mechanism before signing up to a service. EURALVA would therefore like to see a common EU-wide code of practice for resolving any disputes. An alternative dispute resolution mechanism would only really enhance consumer confidence in new products and services if it were to be available to the consumer in her/his own Member State.

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?

Yes, we do, especially if the Commission wishes to enhance the financial base of creative content. As with satellite broadcasting platforms, access to DRM solutions should either be managed by the public authorities, or by the DRM systems operative *on a fair, reasonable and non-discriminatory basis*. On the other hand, given the disputes which have taken place regarding access to satellite platforms, there should also be common EU-wide guidelines on what financial and other arrangements were considered to be fair and reasonable.

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?

Yes, although a stronger, and possibly more contentious, form of intervention may be necessary.

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 EURALVA indicated in its answer to question (1), there are several business models for developing online creative content. One of the simplest and most effective ways to do this, would be for the EU Competition Commission to allow State-aided public service broadcasters to use their State aided funds to acquire multi-territory rights for the on-line distribution of their works.

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)?

This business model would only apply to certain types of on-line catalogue works. There are significant differences between audio (musical) works and audiovisual works in this regard. Although nearly all DVDs and CDs have multi-territory rights licences, EURALVA has not seen any evidence to suggest that back-catalogue works which are available on a multi-territorial basis are more widely available than those which are played on radio or shown on television.

Legal offers and piracy

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

Consumers are stakeholders, as well as authors, producers and broadcasters. They effectively pay up-front for the production of creative works by broadcasters. If other producers of creative content on-line wish to use DRM systems, they must provide consumers with easily accessible systems, which offer them equivalent choice to that which is available with CDs or DVDs. The latter has a single European copyright zone, and the EU should establish a single EU-wide DRM zone, which is analogous to the DVD zone, and which would surpass the 27 national copyright zones. Moreover, publishers of both CDs and DVDs frequently enhance their offer with programme notes, bonus tracks, or special features. Providers of VoD services could do the same.

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

EURALVA does not consider the Memorandum of Understanding which has recently been adopted in France as an example to follow. By setting up an Internet Authority which is designed to suspend or cut access to the web for those who illegally share files, the law appears to blur the distinction between those who are accused of illegally sharing files, and those who have actually been found guilty of sharing files. Moreover, there is no discussion as to whether the suspension or removal of access to the Internet would be permanent or temporary, or whether access could be regained by the payment of a fine. Although we have only the limited information given by the Commission in its brief summary of the scheme, it appears to continue attempts by right holders to convert breach of copyright (which is a private right allocated by the State) from a civil offence into a criminal offence. Nor is it clear, from the Commission's summary, for how long any convicted offender will be denied access to the web, which is becoming an increasingly essential tool in everyday life.

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

Possibly.

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