

**NOKIA Response  
to the  
Reflection Document of DG INFSO and DG MARKT**

**“Creative Content in a European Digital Single Market: Challenges for the Future”  
22 October 2009**

## **INTRODUCTION**

Nokia welcomes the Commission’s Reflection Document on Creative Content in a European Digital Single Market. This is a thought provoking and forward looking document, which Nokia sees as opening an important and topical policy debate on the role of copyright in the digital era, and we appreciate the opportunity to contribute to this consultation.

Nokia is pleased to enclose our submission in the form of a White Paper entitled “The Digital Copyright Eco-system: a holistic approach to change”. This provides a detailed analysis and discussion of the issues in the Reflection Document where Nokia has experience, and in particular explores the correlation between Content Licensing, the Private Copy Exception including Private Copy Levies, and Reducing Piracy - where the overall goal is to provide a rich and accessible digital experience for consumers, against the backdrop of Cultural Diversity.

In the accompanying paper Nokia proposes a holistic approach to copyright reform suggesting that access to legal digital content must be made easier and more attractive across a European Digital Single Market.

The following is a summary of the key points in response to the Reflection Document:

## **SUMMARY**

**Key Proposition:** Nokia’s key proposition, closely aligned with the ideas presented in the Reflection Document, is that access to legal digital content must be made easier and more attractive across a European Digital Single Market, bringing significant opportunities and benefits for creators and rightholders in all Member States, and helping the European Union meet its ambitions in the knowledge economy.

To this end, the highest priority of digital copyright policy should be to (a) foster a climate conducive to the development of a vibrant and thriving market for the distribution of legitimate digital content through attractive and innovative services for the benefit of consumers, where (b) rights owners are fairly compensated; and which (c) is supportive of Europe’s unique cultural wealth and diversity, but (d) is intolerant of unauthorised copying. All other policy considerations should be consistent with this overarching goal.

**Stakeholders:** As acknowledged in the Reflection Document, digital technologies bring new actors in the copyright value chain. To illustrate this, Nokia - once regarded as a conventional equipment manufacturer - is now a content service provider having embraced business models premised on content delivery and hosting on-line music services. New and emerging actors have to be recognised, consulted, and engaged as legitimate stakeholders in the wider, on-going copyright debate.

## Music Licensing:

**CISAC decision:** Nokia regards the Commission's 2008 CISAC decision as a pivotal step towards reforming the collective music licensing landscape in Europe and creating a better functioning market. Following the CISAC decision, Nokia has made substantial breakthroughs in concluding pan-European licenses for music services. The CISAC Decision should now be affirmed in order to remove the still prevailing uncertainty about the validity and future of pan-European licensing for digital services between rightholders and licensees on a commercial market-driven basis, and we invite additional reform as elaborated in the accompanying White Paper.

**One-stop shop:** A so-called "one-stop shop", interpreted as a single entity granting a single license for all music composition rights for all music repertoires and catalogues, would not and cannot be conducive to an open, competitive, commercial licensing landscape. A fluid and efficient market-based licensing model should consist of a reasonable and reduced number of market participants acting independently without any party distorting commercial terms through application of monopoly leverage. It is envisaged that smaller catalogues could potentially be aggregated.

**Licensing Efficiencies:** Horizontal fragmentation, which means that a unitary economic right is controlled by multiple parties, runs contrary to the aims of efficient licensing. Nokia supports the suggestion in section 5.2 of the Reflection Document for a single right in musical compositions for digital commerce, combining what the Reflection Document calls "the two indispensable 'digital copyrights' involved...", i.e. the digital right of reproduction and the digital performance right.

The Reflection Document also raises in section 5.2 the notion of a "more ambitious form of one-stop shop" whereby the diversity of rights in a particular recording (including any underlying works and recordings embodied therein) would be re-aggregated so they can be integrated in a single licence. This approach deserves further examination to see if it could lead to more efficient rollout of new business models premised on pan-European commercial licensing. In any case, even if the more complete re-aggregation of rights is considered as a longer term goal, the combination of the reproduction and performance rights in a single digital transmission right would be a significant and welcome step forward in the shorter term.

**Scope of Licences – secondary copies:** The practice of structuring a licence to exclude all but the initial download (i.e. excluding so-called secondary copies), or indeed to exclude any uses which the service would seek to authorise to users, so as not to prejudice claims for private copy levies, is inconsistent with the evolution of effective content licensing models in Europe, and should not be permissible. This practice prevails because the revenue opportunities from private copy levies can be leveraged to be potentially more lucrative than direct licensing.

**Licensing, not levies:** Rightholders should be remunerated through licensing, not private copy levies. Levies should not be seen as a primary revenue stream for digital content. Direct licensing is more appropriate and fairer for all. Returns to rights holders are correlated to the value of consumed content and users pay for what they consume, thus encouraging flexible licensing models: a virtuous circle.

**Private copy levies:** The highly fragmented, unpredictable, unfair and outmoded national levies systems in various Member States are an anathema to the Digital Single Market, yet we are facing increasing claims to pay levies on more and more digital devices like mobile phones. The private copy levy system across Europe is in need of urgent and radical review. The Stakeholder Forum initiative established by Commissioner McCreevy more than 18 months ago has not produced an outcome. **Leadership at European level is needed.** Addressing the scope of the private copy exception would be a starting point – see below.

**Transparency for Rights Clearance:** It would be an important step forward to develop sufficient transparency about the repertoire of musical works controlled by each licensor. This would aid front-end licensing from the point of view of rights clearance as well as back-end payment processing.

**Audiovisual:** Nokia agrees that audiovisual licensing is even more complex than music licensing due to the even greater number and diversity of potential rights holders and different rights which can vary by virtue of different law, contract, tradition and practice. In this context, the concept put forward in the Reflection Document of re-aggregating all the manifold layers of different rights and rightholders so they can be integrated into a single overarching licence, would seem to deserve further analysis as a possible solution to promoting a more streamlined and effective licensing landscape for audiovisual works.

**Harmonised European Copyright Law:** Nokia acknowledges there might be a benefit – in the longer term – of having a truly unified legal framework for copyright in Europe. However, this must not be seen as a quick fix. The impact would need to be carefully analysed and better understood particularly as regards transitional arrangements and the legacy effect of national copyrights.

However, there are aspects of copyright which would benefit from an EU-level approach, and where immediate benefits would be realisable, notably in the area of private copy exceptions, as follows:

**Consistent approach to the boundaries of the “private copy exception”:** It would be beneficial to harmonise the maximum scope of private copy exceptions in the EU, so all Member States would have consistent rules, tidying up the fragmentation we have today. To be clear, this is not a call for all Member States to have exactly the same private copy exceptions, but it is a call for the maximum scope of the private copy exception to be defined at EU level. It would still be permissible for Member States to have narrower (but not broader) private copy exceptions within their national laws.

**Fair use vs. exceptions:** Nokia believes there is a case for policy makers to further explore and conduct economic research into the comparative benefits of introducing a ‘fair use’ system in Europe, compared with the complex catalogue of prescribed exceptions we have today.

**Alternative forms of remuneration:** Nokia certainly agrees that effective measures are needed against unauthorised copying, but raising special fees from legitimate users in order to compensate rightholders can never be the answer. Such schemes would in effect legitimise and only encourage more piracy and discourage investment in the innovation of legitimate licensed offerings. Policy should focus instead on achieving an efficient licensing environment bringing attractive and diverse legal offerings to consumers, where rightholders are remunerated **commensurately - and solely** - through direct licensing.

**Separation of commercial licensing and cultural subsidies:** Potential conflicts may arise when the same organisations are involved both with commercial licensing and with subsidising non-commercial national cultural programmes. It would be beneficial to separate collective rights administration from the work of subsidising cultural diversity and grass-roots funding of local cultural initiatives.

**Education and Awareness:** Education and awareness campaigns for consumers would help clarify the boundaries of legal private copying and so help avoid inadvertent illegal copying. The European Commission and Member States have a key role to play here, as do stakeholders who could make a bigger contribution.

All of the aspects summarised above are elaborated further in the accompanying Nokia White Paper “The Digital Copyright Eco-system: a holistic approach to change”

22 December 2009

**NOKIA**

**THE DIGITAL COPYRIGHT ECO-SYSTEM**  
**A holistic approach to change**

**Nokia White Paper**  
September 2009

**THE DIGITAL COPYRIGHT ECO-SYSTEM**  
**A holistic approach to change**

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# THE DIGITAL COPYRIGHT ECO-SYSTEM

## A holistic approach to change

### EXECUTIVE SUMMARY

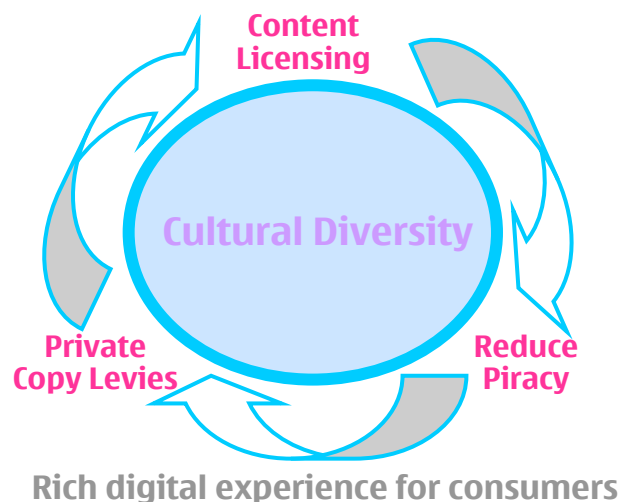
Copyright is currently a topic widely debated among policy makers in Europe, both at European and Member State level, particularly in the context of the wider digital agenda.

The digital market place is going through an extremely vibrant phase of experimentation with new consumer propositions and business models, with the aim of delivering a rich and flexible digital experience - benefiting European consumers and rightsholders alike. At the same time such a dynamic and rapidly evolving environment may also give rise to concerns about market failure, abusive practices, and/or illegal behaviour, resulting in calls for more regulatory oversight and intervention.

In this paper we advocate the need for further reform, and propose some key policy objectives, which Nokia hopes to see adopted, developed and implemented. Our goal throughout is to carefully balance competing interests to ensure a climate conducive to the development of innovative new business and content distribution models for the benefit of the European consumer.

The public debate about digital copyright in Europe has recognised and is to some extent addressing: (1) efficient commercial access to digital content (licensing); (2) unauthorised uploading, downloading and sharing by private individuals (piracy); (3) fair compensation for rightholders and private copy levies; (4) easy consumer access to a rich source of legal content; and (5) cultural promotion and subsidy.

This paper addresses these issues in the round, exploring the impact one has on the other, demonstrating that these different aspects of the debate - often addressed separately in policy and legislative agendas - are inextricably linked and should not be treated in isolation. Specifically, we propose a more **holistic approach to copyright reform**, with the aim of finding workable and agreeable solutions to all these issues. To this end we explore the correlation between Content Licensing, Private Copy Levies, and Reducing Piracy, in order to provide a rich and accessible digital experience for consumers, against the backdrop of Cultural Diversity.



Our key proposition is that access to legal digital content must be made easier and more attractive across a Digital Single Market. To this end, the highest priority of digital copyright policy should be to (i) foster a climate conducive to the development of a vibrant and thriving market for the distribution of legitimate digital content through attractive and innovative services for the benefit of consumers, where (ii) right holders are fairly compensated; and which (iii) is supportive of Europe's unique cultural wealth and diversity, but (iv) is intolerant of unauthorised copying.

All other policy considerations should be consistent with this overarching goal.

## 1. INTRODUCTION

### 1.1 Background

Copyright is currently a topic widely debated among policy makers in Europe, particularly in the context of the digital agenda. Various public consultations and stakeholder dialogues are ongoing, both at European and Member State level. Many countries are reviewing the role of intermediaries and the applicable sanctions when consumers infringe copyright on the internet, and some are reviewing the applicability of private copy levies to new categories of digital products. In Europe the Commission DG MARKT is facilitating stakeholder dialogues addressing respectively online piracy and copyright levies. Commissioners Reding and Kuneva have called for less fragmented laws on private copying and for a borderless digital market within the EU/EEA<sup>1</sup>, while DG COMP has conducted a public consultation on the online distribution of music<sup>2</sup>.

The public debate in Europe about copyright in the digital era has recognised and is, to some extent, addressing – albeit in a fragmented way - the key aspects of (1) efficient commercial access to digital content (licensing), (2) easy consumer access to a rich source of legal content within a borderless EU/EEA digital market, (3) fair compensation for rightholders and private copy levies, (4) unauthorised uploading, downloading and sharing by private individuals (piracy), and (5) the cultural dimension.

This paper addresses these issues in the round, exploring the impact one has on the other, demonstrating that these different aspects of the debate - often addressed separately in policy and legislative agendas - are inextricably linked. Specifically, we seek to propose a more holistic approach to copyright reform, with the aim of finding workable and agreeable solutions to all these issues and to this end we explore the correlation between the three aspects of Content Licensing, Private Copy Levies, and Reducing Piracy, in order to provide a rich and accessible digital experience for consumers against the backdrop of Cultural Diversity.

Above all, we propose that, in the context of music (and audiovisual) distribution, the highest priority of digital copyright policy should be to foster a climate conducive to the development of a vibrant and thriving market for the distribution of legitimate digital content through attractive and innovative services for the benefit of consumers, where right holders are fairly compensated; supportive of Europe's unique cultural wealth and diversity, but intolerant of unauthorised copying.

### 1.2. About Nokia

Nokia is a leader in mobility, driving the transformation and growth of the converging Internet and communications industries. We make a wide range of mobile devices with services and software that enable people to experience music, navigation, video, television, imaging, games, messaging and more. Our current music services include Nokia Music Store and Comes With Music™, and we are continuously developing new innovative service propositions. Developing and growing our offering of consumer Internet services is a key area of focus. We also provide equipment, solutions and services for communications networks through Nokia Siemens Networks.

**Nokia Music Store** is a pay-per-download on-line music service, offering as part of the digital store a full range of experiences, both over the internet as well as over the air, to compatible Nokia devices or via a computer. For more information go to: <http://musicstore.nokia.com>

**Comes With Music** is an innovative service where relevant devices include unlimited downloads from the Nokia Comes With Music service for a defined period, typically one year. Downloaded music can be transferred between registered Comes With Music devices. After the subscription period ends the consumer is entitled to keep and enjoy all the music downloaded. For more information go to: <http://www.comeswithmusic.com>

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<sup>1</sup> See Press Release:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/702&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>2</sup> Closed 30 June 2009. See: [http://ec.europa.eu/competition/sectors/media/online\\_commerce.html](http://ec.europa.eu/competition/sectors/media/online_commerce.html)

### 1.3. Stakeholders in the debate

We wish to emphasise the importance of carefully balancing the competing interests of different stakeholders to ensure a climate conducive to the development of innovative new business and content distribution models for the benefit of the European consumer.

Too often it seems the voice of the content industry and rights holder representatives overshadows other interests in the digital copyright debate, especially when it comes to digital piracy. Other players in the value chain such as digital music service providers are not sufficiently acknowledged as key stakeholders, although without them there would be no digital music business.

The requirement for balance is increasingly important as the traditional boundaries between categories of stakeholders in the copyright value chain break down and become increasingly blurred. To illustrate this, Nokia - once regarded as a conventional equipment manufacturer - is now a content service provider having moved towards business models premised on content delivery and hosting on-line music services.

We would like to see digital music service providers treated as legitimate, equal stakeholders in the wider digital copyright debate, not only as technology enablers but as the innovators of consumer propositions helping to bring new content delivery models and offerings to the market for the benefit of consumers and right holders alike.

Consumers are also a legitimate stakeholder in this debate. The copyright environment needs to achieve a balance between the interests of right holders and the general public's right of access to content/knowledge/information.

## 2. CONTENT LICENSING<sup>3</sup>

Consumer-friendly access  
to attractive legal offers

The highest priority of Policy in the digital copyright eco-system should be the promotion of a vibrant and thriving pan-European market for the distribution of legal digital content, giving the consumer easy, flexible access to a rich source of digital content while fostering a climate conducive to innovation, experimentation and evolution in the digital marketplace.

It is a fundamental tenet of Nokia to respect copyright and recognise the entitlement of rights holders to receive **fair, reasonable and proportionate remuneration** for use of their copyright-protected works.

In order to ensure and encourage the proper functioning of the overall digital copyright eco-system, it is vital, as well as fairer and more efficient that rights holders be remunerated directly through market-based licensing rather than be compensated by indirect remunerative schemes such as private copy levies.

The more digital content and licensed usage that consumers are able to acquire as part of fully licensed services the less need there is for private copy compensation (i.e. levies) because rights holders are then directly and fairly compensated. It is critical that service providers, as prospective licencees, are able to negotiate on a commercial basis and obtain licenses covering the full scope of uses made available to consumers. Otherwise, users end up paying twice – i.e. an arbitrary private copy levy on top of the actual license fee. In that case, consumers would have no transparency as to the overall eventual costs of specific services they wish to subscribe to, and those service providers targeted to pay levies cannot assess their full costs. As a consequence, service providers may be inclined to offer more limited services - or no services at all - resulting in European consumers losing out, and discouraging market innovation and experimentation<sup>4</sup>.

In addition, the more content is made easily accessible through services that appeal to the consumer the less incentive there is for consumers to acquire unauthorised copies (piracy). This is explored in more detail in section 4.2 below.

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<sup>3</sup> Nokia's position on Content Licensing is set out more fully in our submission to the European Commission DG Competition responsive to the Consultation on the Online distribution of Music – see:[http://ec.europa.eu/competition/consultations/2009\\_online\\_commerce/nokia.pdf](http://ec.europa.eu/competition/consultations/2009_online_commerce/nokia.pdf)

<sup>4</sup> It is interesting to note that licensing already functions as we are proposing here in at least one EU territory (the United Kingdom), where an innovative and experimental market environment for digital distribution thrives.

## 2.1. Market-based licensing regime

Policy emphasis should be driven by the need for effective and efficient pan-European licensing (rather than from an 'administration of rights' perspective) to ensure seamless access to digital content, bearing in mind that the market should be characterised by willing rights holders and willing commercial licensees. In order to achieve this goal, impediments to efficient licensing have to be removed.

Nokia believes that a commercial market-based licensing regime is in the interest of European consumers and encourages the development of a vibrant and innovative digital marketplace for copyrighted products including both **music** and **audiovisual** works. A static tariff-based system (such as the historic tariff system applied to compact discs or the system applied to single-track a la carte downloads) will not provide for the agility required in testing innovative new business models and consumer propositions which are made possible by the digital era. As we can see from various announcements by Nokia and other digital music service providers, the marketplace is going through a vibrant phase of experimentation with new consumer propositions and business models – all of which benefits European consumers and rights holders alike. These new offerings – which offer the most hope for effectively combating piracy and remunerating artists - require bespoke commercial licensing arrangements in an environment where licensors and licensees may interact in a functioning market place of rights.

A primary Policy objective must be to **enable effective pan-European licensing** and to create new attractive possibilities for consumers to purchase and consume digital content. The achievement of this aim will support making the European Union the leading knowledge economy and online business community. It will also be an effective weapon against piracy. Licensing reform in Europe needs to be accelerated – we cannot allow the present uncertainty to cripple or hold back the development of a functioning marketplace for digital content in Europe. In particular, the European Commission's "CISAC decision" in July 2008 was a significant step forward towards the creation of a better functioning market, and the CISAC decision should now be affirmed in order to remove the still prevailing uncertainty about the validity of pan-European licensing for digital services between rights holders and licensees on a commercial market-driven basis. Subsequent to the CISAC decision Nokia has made substantial breakthroughs by concluding pan-European licensing deals for our digital music services with numerous music publishers, their licensing agents and European societies of authors, composers and music publishers. However we need to achieve further progress by establishing a true **Digital Single Market** for content and services where rights holders represent their respective rights and works for the whole of Europe.

An effective market-based licensing regime requires licensees to be able to negotiate **fair and reasonable royalty rates** with the principal rights holders who have the ability to determine the commercial terms. A so-called "one-stop shop" would not allow this and is not workable in the new agile internet environment where new service innovations are introduced in a constant flow. Instead, we envisage that a fluid and efficient licensing regime would consist of a reasonable number of licensing entities acting independently without any one party distorting the commercial terms through the application of monopoly leverage. Smaller catalogues could eventually be aggregated to allow for comprehensive licensing of musical works from a manageable number of licensors.

We see such a market place already existing for recording rights, and suggest that there is no need for the musical composition copyright licensing landscape to function differently. We question why the licensing of musical copyrights should not be joined (i.e. merged) with recording rights (whether sound recording rights or audiovisual rights) to overcome the fundamental inefficiency of digital music service providers needing two separate licenses for one unitary economic activity, i.e. offering consumers a service accessing recorded music or audiovisual recordings.

At this point we would also make the observation that, although music licensing is beginning to go through a positive and welcome change process, policy makers in future will also need to address audiovisual content where the licensing challenges for making TV and movies available to European consumers in attractive and readily accessible ways are even more complicated and burdensome, as discussed in more detail in section 2.6 below.

## 2.2. Ensuring access at reasonable commercial terms

Based on the premise that licensing entities are in the market place for the purpose of proactively licensing the repertoire they represent, impartial pan-European forums are needed to resolve any market failures and to prevent abuse by licensors that hold dominant market power (whether rights holders themselves, licensing agents, or collecting societies) so that inefficiencies or distortions through the application of monopoly leverage can be

avoided or corrected. The ability to have commercial disputes settled by such impartial forums would bring several benefits, including the ability for service providers to proceed to market even in the absence of a final commercial agreement, knowing their financial risk would be limited to fair remuneration decided as part of the subsequent proceedings. Such a forum would have the ability to resolve commercial disputes by benchmarking against financial terms agreed with the rest of the licensor community, taking into account the level of usage.

### 2.3. Transparency for Rights Clearance

It would be an important step forward to develop sufficient transparency as to the repertoire of musical works controlled by each licensor. This would not only aid front-end licensing from the point of view of rights clearance (as a commercial licensee we must know what we are licensing) but also back-end payment processing.

In the case of musical works, we propose including metadata identifying the author/composer(s), ISWC code, music publisher(s) and splits (of rights) of each musical work. There are benefits to rights holders if digital service providers also had access to such metadata, as we could provide more detailed reports, enabling rights holders to make faster and more accurate distributions. Significantly, having insight into the repertoire available for licensing from a rights holder enables a service provider to make better and more informed commercial decisions in licensing discussions, thus facilitating the entire licensing process for the ultimate benefit of the consumer.

The corresponding level of transparency should also apply for audiovisual works.

### 2.4. Horizontal fragmentation of rights (separate reproduction and performance rights)

We see a risk associated with horizontal fragmentation of the market, i.e. where rights to the same economic right are controlled by multiple parties.

There are two primary levels of fragmentation of the rights in music content. First there are distinct rights in (1) the sound recording (the actual recording of the performance), and (2) the composition (i.e. the musical work itself). These may or may not be under the same control which introduces a first tier of complexity.

However, there is a secondary level of fragmentation because under current EU practice the composition right is itself further divided into (1) a reproduction right, and (2) a performance right. These two split rights in the same musical work may be managed and licensed by different entities, possibly even with different interests. This introduces a further tier of complexity because there is a risk that the separate holders of the reproduction right and the performance right in a particular musical work would not agree on a licensing structure, which could significantly complicate the evolution of nascent pan-European licensing regime, and reverse the substantial gains made during the past year. Nokia sees no justification for the copyright of a musical work contained in a download to be split into two separate pieces (i.e. separate reproduction and performance rights), but if that is to remain the case in the EU, we would at least prefer to see that the two rights must always be licensed together in the same license. We can compare the situation in Europe with that in the United States, for example, where only a reproduction right is needed for a download. This in itself is a significant simplification of the licensing regime that offers service providers and, consequently, consumers an important advantage in bringing innovative and experimental new services efficiently and on a commercial basis to a key digital market.

### 2.5. Digital Single Market

All citizens of the 27 Member States of the European Union enjoy freedom of movement. When this freedom is exercised people expect to be able to access content from their home country and in their own language when living or travelling abroad. However, complex licensing regimes can lead to a situation where, as one illustrative example, an Italian music fan living in Belgium cannot access her preferred Italian service, which may only be licensed for access within Italy. Nokia wants to ensure all European consumers have a choice of services and access to as much legal content as possible throughout Europe, celebrating the richness of European cultural diversity. In our view this is by far the best measure to help reduce the incentive for otherwise law abiding citizens to turn to illegal content (piracy), or to use grey market services. This illustrates why there is an urgent need for the completion of a **Digital Single Market**, where content services can be offered easily and equally throughout the territory of the European Union.

## 2.6. Audiovisual works

We believe it is also important to accelerate development of a Digital Single Market in the European Union also for **audiovisual works**, including films, television productions, music videos and podcasts. Licensing of audiovisual works can be extremely complicated and burdensome (even more so than for music), as the number of rights holders with rights requiring licenses in any single audiovisual work can vary considerably (and differently in different countries), and all rights holders may not even be identifiable by the licensee. Similarly, operational duties relating to audiovisual works can be complex and costly. It is vital to simplify the rights regime for audiovisual works and avoid digital gridlock in audiovisual licensing in order to continue the digital evolution of goods and services in Europe.

An efficient audiovisual licensing market in Europe will demand more attention from policy makers in future.

## 2.7. Interface with private copy levies – the issue of so-called “Secondary copies”

For the purposes of nurturing new digital services and ensuring legal clarity, it is important that the entities granting licenses to service providers affirm and ensure that their licenses authorise all uses permitted by the digital services they license. Careful attention is needed in connection with the contentious issue of private copy levies which could have an unfortunate impact on digital licensing.

A regime in which service providers could legitimately license only one reproduction (such as the first download) of a file for consumer consumption (on the basis that all secondary copies would be excluded – i.e. unlicensed – as private copies) within a service where a service provider seeks to offer more extensive usage rights to consumers and where other rights holders are willing to license the entirety of such usage rights would seriously detract from the whole consumer value proposition in the digital content service area. This position is known to be held and promoted by several collecting societies who seek to structure their licenses and licensing regime so as not to prejudice their claims for copyright levies, because the revenue opportunities from private copy levies are seen as more lucrative than licensing. This is seriously hindering effective content licensing because consumers do not have transparency as to the overall eventual costs of specific services they wish to subscribe to, and businesses throughout the value chain (including service providers targeted to pay levies) are unable to assess their full costs if there is an impact from, or claim for, levies. As a consequence, service providers may offer more limited services – or no services at all – resulting in European consumers losing out, and discouraging market innovation and experimentation. The consumer also loses out economically because, in such a scenario, consumers would pay a levy repeatedly - potentially without limitation - for the same digital content on their different digital devices (platforms) and blank media, on top of the license fee, a phenomenon known as “double or multiple dipping” – which further boosts the potential levy revenue compared with license income. For these reasons, and in order to ensure a “level digital playing field”, licenses must cover and authorise all uses permitted within the full scope of the digital service offering.

## 3. PRIVATE COPY LEVIES<sup>5</sup>

Direct licensing is more appropriate and fairer for all

Nokia believes that private copy levies, introduced as a crude remuneration model in the analogue era to reflect the fact that consumers were able (and permitted) to copy unlicensed content notably onto blank cassette tapes, are neither appropriate nor fair in the digital world, where direct licensing is possible and more appropriate.

Unfortunately claims for levies are now rapidly spreading to more and more digital products – notably including mobile phones - in ever more countries across Europe.

Consumers generally do not know they are paying a private copy levy on digital equipment they purchase, nor how much it is, or what it is for - or that the amount they pay varies significantly from country to country. At the very least, the amount of the levy should be made visible to consumers at the point of sale.

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<sup>5</sup> Nokia's position on Copyright Levies is set out in more detail in our 18 April 2008 response to the European Commission DGMARKT Consultation (Second Call for Comments) on “Fair Compensation for Acts of Private Copying”

### 3.1 Interface with Licensing

Private copy levies should never be contemplated as, or be allowed to develop into, a primary or significant revenue source for digital content, as this would discourage legitimate and innovative digital distribution models in Europe as well as disincentivise commercial licensing activities, at a time when – despite the challenges of significant digital piracy – many service providers are making substantial investments in developing and launching new digital offerings.

In order to ensure and encourage the proper functioning of the overall digital copyright eco-system, it is not only vital, but also fairer and more efficient for rights holders to be remunerated directly through licensing rather than be compensated by indirect remunerative schemes such as private copy levies. With licensing, the returns to rights holders are readily correlated to the consumers' use of content which is not at all the case with levies<sup>6</sup>. On the contrary, levies systems – which notoriously lack transparency even for the beneficiaries – are frequently characterised as “rough justice” even for rightsholders because they tend not to see their just rewards.

Policy should focus primarily on achieving a digital copyright environment conducive to efficient licensing where rights holders are remunerated directly through licensing instead of indirect, inefficient and even arbitrary and nebulous compensatory schemes such as private copy levies. The more digital content and uses of such content that consumers (are able to) acquire as fully licensed at the outset the less need there is for levies because rights holders are then directly and fairly compensated.

### 3.2. Interface with piracy

It is of serious concern that, expressly or tacitly, the real driver for increased application of levies seems to be widespread unauthorised (illegal) copying and distribution (piracy) which, some would argue is causing negative growth in parts of the traditional recorded music industry. Going back to first principles, the rationale for levies is as compensation for uncompensated acts of legitimate private copying causing more than minimal harm. It is important *not* to think of equipment levies as a solution for compensating the harm (and the related decreases in revenues from lower recorded-music sales) arising from piracy, as there is no sound legal basis for that, nor should there be. This fundamental point is often lost, as the pressure grows from collecting societies to increase levies and extend their application to an ever widening scope of digital devices. We do not agree that digital equipment makers should be singled out to subsidise losses in the recorded music industry through equipment levies. We completely agree that **the problem of piracy demands attention, cooperation and active measures** by the European Commission, governments and all stakeholders, but private copy levies have no role in such a debate. This fundamental tenet – namely that “fair compensation” under the Copyright Directive 2001/29/EC is solely for non-minimal harm arising from uncompensated private copying made legal pursuant to lawful private copy exceptions – needs to be re-confirmed, upheld and endorsed both in principle and in practice across the Community.

Another reason why private copy levies should not be contemplated as a compensation mechanism for piracy is that this would blur the distinction between legal and illegal downloads and have the unfortunate consequence of encouraging – even legitimising – illicit copying (piracy), whilst discouraging service providers' extensive investments in legal and authorised consumer offerings.

We further maintain that the copyright levy system is inherently serving to perpetuate unauthorised copying, i.e. piracy, because once a levy has been paid on a device there is a misperception that the owner can download any content indiscriminately whether authorised or not.

Furthermore, the phenomenon of double or multiple dipping described above, i.e. where consumers pay a levy multiple times on different devices, will result in consumers paying over and over again for the same content, serving only to discourage the practice of acquiring content from authorised sources. Put simply, why would a consumer pay for a legal licensed download when he has already paid multiple times to copy the content onto different platforms and devices. Such an approach would eventually destroy on-line services offering legitimate digital content to consumers.

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<sup>6</sup> In the context of the debate on levies there has been insufficient analysis of the valuation of various copies that consumers generate in the digital environment, as more and more copies are made on ever more devices (several computers, PDAs, digital set top boxes, memory sticks and memory cards, portable music players, digital mobile phones, games consoles, digital cameras and so on). As consumers tend to replicate much of the same content across their various devices and continuously replace those devices over time but re-load the same content, it is Nokia's view that not all copies have equal economic value.

### 3.3. Consistent approach to boundaries of the Private Copy Exception

Much of the problem in Europe stems from the fact that there is no common understanding or consistent approach to private copying. Private copying exceptions differ enormously from Member State to Member State and some are more transparent than others. This is confusing for consumers who have no idea what they can and cannot do legitimately. Indeed what a consumer may be legally entitled to do in one Member State may be illegal in another member State, even using exactly the same device.

It would therefore be beneficial to harmonise the maximum scope of private copy exceptions in the EU, so all Member States rules would be consistent, tidying up the fragmentation we have today.

To be clear, this is not a call for all Member States to have exactly the same private copy exceptions, but it is a call for the maximum scope of the private copy exception to be defined at EU level. It would still be permissible for Member States to have narrower (but not broader) private copy exceptions within their national laws.

As a matter of general principle the exception should, on the one hand, be drawn **as broadly as possible** to embrace all those acts of private copying such as platform or format shifting (i.e. copying the same piece of legal content onto another device) which are happening as a matter of course, and that most reasonable people believe already are, or should be, permissible. On the other hand, it is imperative the exception remains **narrow and sufficiently limited** so that it causes no significant harm to rightholders<sup>7</sup>. This is the critical balance that has to be struck.

The 'limit' or 'boundary' of the prescribed exception should preferably be *purposive* rather than quantitative - contingent on causing no significant proven harm to the rights holder, in the sense that the permitted copy did not result in a lost sale. Provided there is genuinely no lost sale, the nature (and impact) of private copying acts is, and should be considered, immaterial. The presumption should be that not all private copies for personal use have the same economic value or result in a lost sale<sup>8</sup>.

This would also provide an opportunity to clarify that certain private copying activities of legally acquired content, such as platform or format shifting as well as time shifting, for personal use or within the strict domestic family circle, cause no more than minimal harm to the rightholder and so are outside the scope of levies meaning no compensation falls due.

More education and awareness campaigns, especially at European level, would not only foster goodwill among consumers and rights holders alike, but would also help clarify the boundaries of legal private copying and so help avoid inadvertent illegal copying. The on-line eYouGuide Guide<sup>9</sup> launched by European Commissioners Reding and Kuneva in May 2009 sets a good example. Put simply, consumers would know more clearly what they can and cannot do, and as most consumers are honest would modify their behaviour to act within the law. Indeed this may result in more sales of original works, as consumers would know with greater certainty what falls outside the private copy exception and so would be more inclined to purchase a second original rather than make an illegal copy. This would be an improvement over the situation today.

### 3.4. Fair use vs. (private copy) exceptions

A broader and more fundamental, but equally high-priority issue in the field of digital copyright is whether private copy exceptions (and indeed the other exceptions prescribed in European copyright law) are appropriately circumscribed. Europe has developed a catalogue of precisely-defined exceptions, some of which are optional for Member States, including the private copy exception. Arguably, these exceptions are too precisely defined and too inflexible to accommodate technological, business and societal developments, particularly those impacting private copy behaviour in the digital environment. Nokia would encourage policy makers to further explore and conduct economic research into the comparative benefits of to a 'fair use' system<sup>10</sup> in Europe.

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<sup>7</sup> And remaining compliant with the so-called 3-step Test in Article 5.5 of EU Copyright Directive 2001/29/EC.

<sup>8</sup> As commented in footnote 6 above, since consumers tend to replicate much of the same content across their various devices and continuously replace those devices over time but re-load the same content, it is Nokia's view that not all copies have equal economic value nor result in lost sales.

<sup>9</sup> [http://ec.europa.eu/information\\_society/eyouguide/index\\_en.htm](http://ec.europa.eu/information_society/eyouguide/index_en.htm)

<sup>10</sup> For example, the US has a broadly stated fair use defence, aimed at balancing the interests of the stakeholders and those of society.

For example, activities such as platform or format shifting as well as time shifting of legitimately acquired content by private individuals could fall under a 'fair use' doctrine. This repurposing of legally acquired content within the sphere of contemplated private use should not trigger levies because the use would be contained within a permissible sphere. This would be compatible with a system in which the consumer has acquired rights to licensed digital content - the 'fair use' provision would then merely "mop up" the reasonable private use of such content, excluding illicit copying, i.e. piracy. Of course the fair use doctrine would need to be carefully circumscribed.

#### 4. REDUCING PIRACY

Attractive legal offers is the best weapon against piracy

In Nokia's view the single most important factor in the fight against piracy is the creation of an efficient licensing regime that will encourage and facilitate the development of legitimate content distribution services and ensure the future prosperity of the creative sector, and specifically authors, artists and rights holders across Europe. The creation of a Single Digital Market is also a contributory factor.

In explaining that her key priority now is to work on a consumer-friendly legal framework for accessing digital content in Europe's single market, while ensuring at the same time fair remuneration of creators, Viviane Reding, the European Commissioner for Information Society and Media, stated<sup>11</sup>:

"....internet piracy appears to become more and more "sexy", in particular for the digital natives already, the young generation of intense internet users between 16 and 24. This generation should become the foundation of our digital economy, of new innovation and new growth opportunities. However, Eurostat figures show that 60% of them have downloaded audiovisual content from the internet in the past months without paying. And 28% state that they would not be willing to pay.

These figures reveal the serious deficiencies of the present system. It is necessary to penalise those who are breaking the law. But are there really enough attractive and consumer-friendly legal offers on the market? ..... In my view, growing internet piracy is a vote of no-confidence in existing business models and legal solutions. It should be a wake-up call for policy-makers.

If we do not, very quickly, make it easier and more consumer-friendly to access digital content, we could lose a whole generation as supporters of artistic creation and legal use of digital services. Economically, socially, and culturally, this would be a tragedy."

##### 4.1. Interface with Content Licensing

The vast availability of 'free content' changes existing perceptions of ownership and utility.

Innovative new legal content distribution models (hence, content licensing) are vital to combating unauthorised offerings, and must provide an attractive consumer proposition in terms of accessibility and value (including pricing) in order to compete with illegal downloads. For example, Nokia's Comes With Music service offers millions of music tracks with no additional fee after the initial Comes With Music product is acquired, so that from the consumer's perspective s/he can enjoy all of the music in the offered catalogue, without further content charges. In that sense Comes With Music is perceived by the consumer as an "all-you-can-eat-for-free" model. In addition, Nokia's launch of Comes With Music has prompted other companies to follow Nokia's lead and offer similar services, magnifying the benefits for rights holders and consumers. Some digital music service providers offer streaming in exchange for the consumer accepting exposure to advertising, but without otherwise paying for the service. Attractive legal offerings for consumers, such as these, which industry is now developing, testing and rolling out, are the most viable antidote to piracy.

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<sup>11</sup> The Ludwig Erhard Lecture 2009, Lisbon Council, Brussels, 9 July 2009

## 4.2. Education and Awareness

Nokia believes that more needs to be done in promoting education and awareness programmes for consumers. The European Commission, and Member States have a key role to play here, and the stakeholders also have a critical part to play and could make a bigger contribution<sup>12</sup>. Again, the on-line eYouGuide Guide<sup>13</sup> launched by European Commissioners Reding and Kuneva in May 2009 is a step in the right direction, and sets a good example.

## 4.3. Role of Service Providers (intermediaries)

A closely related matter is the role and potential liability of intermediaries (ISPs and other on-line service providers) for copyright infringement in the digital world. This is currently a topic of hot debate in the Member States, and in June 2009 the European Commission DG Internal Market launched a stakeholder dialogue addressing the issue.

We are very supportive of the Commission taking a strong lead because a fragmented approach with different initiatives and/or codes of practice at national level is certainly not helpful as it would result in new obstacles for the functioning of the Digital Single Market. A European-level approach is imperative.

In order for the digital economy in the EU to grow, online intermediaries operating in Europe need consistency, clarity and transparency on the application of the e-Commerce Directive in this respect. EU Policy makers should therefore have as a key objectives to (1) ensure that Member States do not adopt inconsistent interpretations of the E-Commerce Directive, (2) provide clear guidance on what services are immune from liability, (3) avoid over-regulation and bureaucracy which impedes innovation and adds substantial costs, and (4) ensure that other EU legislation does not erode the limitation of liability provisions established for online intermediaries.

The marketplace is showing that collaboration within and amongst industry, and new and innovative approaches to consumer propositions, are the best ways to meet challenges such as piracy and copyright infringement. Ultimately, no technological solution is perfect and intermediaries should continue to be immune from liability for third party content posted without the intermediary's knowledge.

Central funding, not subsidised  
by levies on digital equipment

## 5. CULTURAL DIMENSION

Europe is unique in having a rich and diverse cultural heritage, and this needs to be supported and nurtured in the digital information age. Copyright is an important pillar of creativity and cultural achievement in Europe, and it is also an important resource. A well-functioning, commercially-based Pan-European licensing regime is critical to the promotion of cultural diversity in Europe.

However, Nokia believes that copyright levies should not be used to help fund cultural activities. Going back to first principles, the purpose of copyright levies is as recompense for uncompensated, but legitimate, private copying. Using levies to subsidise broader cultural initiatives amounts to a back-door cultural tax, imposed arbitrarily and indiscriminately on a segment of industry, without regard to the important role industry is increasingly playing in supporting and promoting the content sector, not least through investments and new services.

It has to be noted that any model which incurs a charge on digital products or services runs the risk of encouraging and not discouraging piracy.

Alternative and transparent models have to be found to provide funding for national cultural purposes, and a preferred solution would be direct state funding out of general tax revenues, rather than shifting liabilities from one industry sector to another as is sometimes the case today.

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<sup>12</sup> In a speech to the MPAA on 3 September 2009 David Lammy, UK IP Minister said "Partnership and innovation by businesses can help consumers understand the problems illegal downloads cause creators and performers, giving them the knowledge and confidence they need to act within the law. If we provide the right combination of enforcement, education and forward-looking policy we can build a culture that provides consumers with legitimate access to the content they want."

<sup>13</sup> [http://ec.europa.eu/information\\_society/eyouguid/index\\_en.htm](http://ec.europa.eu/information_society/eyouguid/index_en.htm)

Furthermore, it has to be recognised that the internet and mobile communication network are themselves important platforms for fostering creativity and cultural initiatives, as acknowledged in the August 2009 Communication<sup>14</sup> from European Commission:

*“Promoting users’ creativity. The new digital habitat (WEB 2.0 and beyond) offers an unprecedented chance to unleash the creativity of Europe’s citizens. The internet today is an interactive political forum, a vibrant social network and a vast source of knowledge. With new participative platforms and services, users have become active players, producers or ‘prosumers’ and it is essential to put in place new policies to encourage users’ creativity and participation.”*

The development of digital distribution, through devices such as mobile phones and from music services such as Nokia Music Store and Comes With Music, has made available a much greater range of professional and amateur work, in a wide range of styles and languages, in a way that old models of distribution could not. Our services boast catalogues of millions of tracks that include all possible musical styles, and offer consumers wide selections of works from the diverse and rich musical cultures of Europe and beyond.

Nokia’s approach is to empower people to be creative, through new media that redefine the categories and meaning of art and culture. This is a democratic stance which serves society and aids artistic and cultural development.

## 5.1. Separation of commercial licensing and cultural subsidies

It is important to separate developments in digital distribution from the important work of subsidising cultural diversity and grass-roots funding of local cultural initiatives often done by collecting societies. We support this important work; however it is important that objectives relating to such social programmes are done without burdening the copyright licensing regime, which needs to be commercially driven and market-based. Potential conflicts arise when the same organisations are involved with commercial licensing and with subsidies to various non-commercial national cultural programmes.

## 6. CONCLUSION

### 6.1 Summary

In this paper Nokia is proposing a more **holistic approach to copyright reform** in the digital content arena, and to this end we have explored the correlation between key strands of the digital copyright debate, notably Content Licensing, Piracy, Levies and Cultural Diversity.

We have presented a number of ideas and policy objectives, but our key proposition is that access to legal digital content must be made easier and more attractive across a Digital Single Market.

To this end, the highest priority of digital copyright policy should be to (i) foster a climate conducive to the development of a vibrant and thriving market for the distribution of legitimate digital content through attractive and innovative services for the benefit of consumers, where (ii) right holders are fairly compensated; and which (iii) is supportive of Europe’s unique cultural wealth and diversity, but (iv) is intolerant of unauthorised copying.

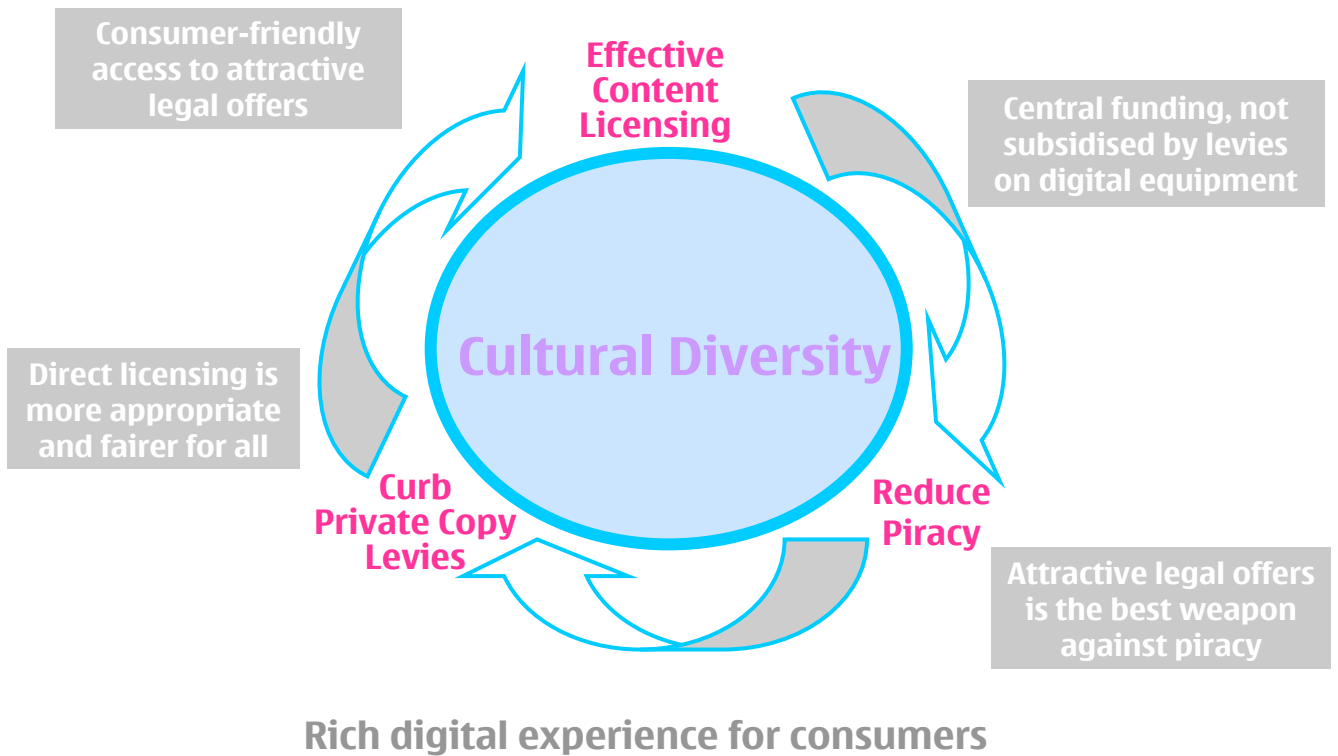
### 6.2 Next steps

Nokia is looking forward to working with policy makers, legislators and other Stakeholders to explore develop and implement the ideas and policy objectives set out in this paper.

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<sup>14</sup> COM(2009) 390. Europe’s Digital Competitiveness Report. Main achievements of the i2010 strategy 2005-2009.

**THE DIGITAL COPYRIGHT ECO-SYSTEM**  
**A holistic approach to change**



**CONTACT DETAILS:**

If you have any questions or require further information please send an email to:

***digital.copyright@nokia.com***