



The European Consumers' Organisation

BEUC/X/076/2006

31 October, 2006
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**Content Online in the Single Market -
Public consultation -
BEUC response**

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Den Europæiske Forbrugerorganisation
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BEUC¹ welcomes the opportunity to respond to the Commission's consultation on Content Online in the Single Market.

EXECUTIVE SUMMARY

- Content online will only deliver its full potential for consumers if the following rights are ensured:
 - Right to choice, knowledge and cultural diversity
 - Right to the principle of "technical neutrality" – defend and maintain consumer rights in the digital environment
 - Right to benefit from technological innovations without abusive restrictions
 - Right to interoperability of content and devices
 - Right to the protection of privacy
 - Right not to be criminalised
- Contractual relations between service providers and consumers and the online market place in general must be based on well established consumer rights, i.e. the right to safety, information, choice, representation, redress, and education.
- In addition, it may be precarious to demand the preservation of net-neutrality through a clear ban on access-tiering by network providers. Also, the more consumers rely on broadband, the more important it will be to guarantee a universal broadband service.

QUESTIONS

Types of creative content and services online

1. Do you offer creative content or services also online? If so, what kind of content or services? Are these content and services substantially different from creative content and services you offer offline (length, format, etc.)?

N.A.

2. Are there other types of content which you feel should be included in the scope of the future Communication? Please indicate the different types of content/services you propose to include.

User-generated content and content created in a collaborative manner should be included in the scope of the future communication. The Commission's policies with regard to online content favours disproportionately content made in traditional ways: by the major film companies and music industry. The amount and quality of user-generated content is rapidly increasing. As the Commission primarily focuses on content made in traditional ways based on established business models, there is a substantial risk that content policies which disrupt the creation of user-generated content are adopted.

¹ BEUC, the European Consumers' Organisation, is the representative organisation of almost 40 independent national consumer organisations from countries of the EU, EEA, and other European countries.

Consumption, creation and diversity of online content

3. Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of a violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.

See 4

4. Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?

BEUC does not believe that the present environment (legal, technical, business, etc.) is conducive to developing consumer trust in and take-up of new creative content services online. Worse, clearly established consumer rights are often ignored in the online environment. It is thus important to extend these questions to the fact that the consumer in the digital era needs the same level of protection as in the analogue one. The consumer needs clearly established rights to fully engage in the online world.

We have in close cooperation with our members - launched a campaign on consumer rights in the digital environment in November 2005 (Website: <http://www.consumersdigitalrights.org>). The campaign presented the first six rights of the consumer in the digital era:

- Right to choice, knowledge and cultural diversity
- Right to the principle of “technical neutrality” – defend and maintain consumer rights in the digital environment
- Right to benefit from technological innovations without abusive restrictions
- Right to interoperability of content and devices
- Right to the protection of privacy
- Right not to be criminalised.

Further details and explanations in respect to these rights can be found on the above mentioned website. We explicitly refer to the entirety of the site and make it an integral part of this submission.

INFORMATION

Consumers in Information and Communication Technology (ICT) markets have limited possibilities to drive competitiveness. ICT products and services are complex and fast-changing. There is a huge information asymmetry between providers and consumers. Limited information presents an important restriction on the ability of consumers to make informed choices in the case of complex products or services, characteristic of the ICT sector. In the lack of clear, objective and comparable information on prices and services consumers tend to make decisions by imperfect proxies, such as advertising.

Furthermore, consumers are not aware of their rights in a fast changing digital environment, especially if the regulatory environment is not clear. This is for example the case in regard to private copying (see our position paper on copyright levies - Response to the Questionnaire BEUC/X/ 047/2006).

EDUCATION

The lack of certainty in the regulatory environment has been clearly abused by industry in their “awareness (raising)” campaigns on intellectual property. Campaigns where children congratulate their father in front of a prison are not appreciated². Unfortunately there is a common trend in marketing and campaigning to “ab”-use terminology for its own purposes. The term “piracy” in the context of unauthorised copying is one example, the other one is “theft”. This has for example blurred the discussion on peer-to-peer (P2P) technology, and exemptions to the exclusive right of reproduction. We are very wary that the European Commission has lost a clear and unbiased terminology to discuss these issues. All in all, we believe that the messages of the industry are counterproductive, and do indeed increase the current trend of mistrust towards industry, and the law makers. We invite the Commission to simply look at user blogs that comment on the(se) respective issues. Consumer education has to be on/deal with consumer rights – not on/with industry rights.

In fact, we believe strongly that industry’s efforts to impose how consumers – according to their own legal interpretations and views and disguised as awareness campaign – cannot use copyrighted materials lead to repercussions, which could result in a significant decrease in the understanding of and respect for copyright in society.

It is difficult to educate consumers on what they can and cannot do in relation to copyrighted works when the legal situation is as vague and unbalanced as is currently the case. EU and national copyright legislation gives very few rights to consumers. Furthermore, the obligations set out are vague and not very balanced. Adding to the difficulties do the standard contracts (EULAs) which use a language incomprehensible to the ordinary consumer. The consequence of this is that no matter how much information is given, the consumer will not be able nor willing to respect the EULAs and copyright legislation. Before any information campaign is launched the legal situation must be improved.

CONTRACT TERMS – END USER LICENSE AGREEMENTS (EULAS)

Contractual relations between service providers and consumers and the market place in general must be based on well-established consumer rights, i.e. the right to safety, information, choice, representation, redress, education, and the satisfaction of basic needs. In the market for online distribution, there is in practice not one right properly implemented.

Unfortunately, even where consumers are properly informed, they may not be in the position to opt for better choices because they are locked into contracts and/or technologies.

Our German member vzbv has recently presented a study examining whether and to what extent the interests of the consumer were adversely affected by the providers of digital copyrighted content.³ For this purpose, a variety of use and licensing conditions and technical protection measures related to various types of digital content marketing services and copyrighted products were examined. The study extended among other things to music download services, commercial electronic publications, online archives, audio and image media, software and eBooks. A thorough legal examination of the use and licensing conditions selected in the course of the study revealed that in practice very often stipulations/ terms and conditions are used, which unreasonably place the consumer at a disadvantage. For example, a question that remains unresolved to this day/until now is whether digitally acquired non-physical copies of works may be resold. The applicable law leaves this question open resulting in considerable legal uncertainty. Legal uncertainties concerning these and other fundamental questions not only affect the consumer, but the provider as well. However, because of his “contract drafting authority” the latter is in a better position than the consumer.

² <http://www.hartabergerecht.de/index.php?id=28>

³ <http://www.vzbv.de/go/dokumente/546/5/index.html> .

For providers, there are additional legal uncertainties with respect to the legitimacy of their conditions of use, above all when they market their content internationally. The legal situation can vary from country to country. The study showed that international providers frequently attempt to shift this legal uncertainty to the user. Thus, several conditions of use contain special kinds of “severability clauses” that basically read: “In some legal systems the following stipulations are not permissible. If you are located in a country in which this stipulation is not permissible, you do not have to follow it and local national legal regulations apply.” The fact that these types of stipulations are in principle not allowed is of little help to the user. Since as a rule he does not know whether the respective stipulation is permissible and valid in his legal system, he is left with only two, less attractive, possibilities: Either he relies on the regulation being invalid and thereby runs the risk of legal action or he must verify the legal situation in every individual case or seek out the expensive advice of a legal expert.

A further practice detrimental to the consumer has also shown up in many cases with respect to the linguistic wording of use and licensing conditions. Providers frequently confront the user with overly complicated General Terms and Conditions that in some cases are poorly adapted to the respective services or products. General Terms and Conditions that are ten or more letter-sized pages in length are no rarity. These frequently contain extensive redundancies and in some cases even contradictory provisions, a fact that considerably impedes the comprehensibility of provisions being imposed on the consumer.

In this respect, conditions of use that have not been adapted in terms of their content are also legally problematic. Some companies always use the same General Terms and Conditions for a number of very different services. It is not just that these types of contracts are generally extremely long and hard to understand. For the customer they also involve the difficulty that he is responsible for seeking out the stipulations/provisions that apply to him. As a result, the user can hardly ascertain which of the many rights and responsibilities covered in the General Terms and Conditions actually apply to him and which do not.

The fact that even expert legal opinions do not always produce clear-cut information about the legal situation illustrates that the user is being overburdened by the current situation. **If providers do not begin to use easily understood and fair conditions of use in their commercial transactions with the consumer, the situation will continue to persist where the end-user enters into agreements on a daily basis without recognizing his rights and responsibilities.** Ultimately, this might also run contrary to the interests of manufacturers and rights holders, because responsibilities that are not understood or taken note of cannot be complied with.

Consumentenbond, our Dutch Member, recently started a campaign denouncing unfair practices of the Dutch music industry in regard to contractual terms and technical restrictions.⁴ Similar actions have been taken in Norway⁵ and other countries.

INTEROPERABILITY

The lack of interoperability reduces consumers' ability to switch and reward competitiveness. Digital Rights Management (DRMs) today increases lack of interoperability between different types of devices (see also BEUC test http://www.consumersdigitalrights.org/cms/test_interop_en.php). An example is the lack of interoperability between Apple's and Microsoft's DRM systems. This presents a limit to fair competition and creates barriers for consumers. DRM systems will most likely have an impact on how the markets for online distribution of music will be structured. The basis for a well functioning online market is that the consumers can buy music files that work on all of their different devices. Another problem is that the producers of DRM systems will end up as gatekeepers for the market, if DRM will be necessary in order to enter the market. Therefore, the following points need to be secured:

- DRM systems will not be a limitation for the access to music, films and other works.

⁴ <http://www.consumentenbond.nl/nieuws/nieuws/5537996?ticket=nietlid>.

⁵ <http://forbrukerportalen.no/Artikler/2006/1138119849.71>

- Different DRM systems must be/are able to interoperate.
- DRM systems must be/are accessible for all artists as well as consumers to avoid DRM systems being gatekeepers to the markets.
- DRM must be based on open standards

Consumers' expectation in their ability to use the purchased product may be effectively hindered by the use of DRM or different implementations of the copyright directive. Differences in rights and exemptions to copy-protected products as well as differences in levy application on products are an obstacle to the well-functioning of the internal market. In addition, it is well acknowledged that DRM is not effective in protecting copyrights but rather a technology that enforces specific business models.

DRMs increase the digital divide. In relation to music the most popular DRMs are easily circumvented either by simply burning the music file onto a CD or by using software readily available on the web. This is a straight forward process for everybody that uses peer-to-peer technology. However, the people that are less technology proficient and do not use peer-to-peer networks, the DRM only inhibits fair use – e.g. playing the file on the portable player of your own choice.

The problem of incompatibility of formats and DRMs will continue in the foreseeable future. There are many technologies helping consumers to solve this problem. However, current legislation hinders consumers from using technology that facilitates interoperability. Giving consumers the ability to chose whichever fixed or portable console he/she wants to use will benefit not only consumers, but also strengthen competition and consequently lead to a more efficient allocation of resources.

Only a provision as in the former article 7 of the French 'Dadvisi' Act on a European level would ensure interoperability.⁶

MARKET CONCENTRATION – VERTICAL INTEGRATION

ICT is a sector that is often characterised by a high level of market concentration. Consumers therefore might not have an adequate number of competing offers on the market. It must be ensured that consumer choices are not limited by strategic alliances between network operators and content providers.

PRIVACY

In order to address privacy in an online environment properly, policy decision makers need to adjust their assessment of privacy risks, taking the social value on board. Companies need to recognize the need and the benefit of public involvement in science and technology. The promotion of a wide use of privacy impact assessments (PIA) would help spot risks and build protection into systems. This methodology to identify risks and impacts related to proposals to develop various technologies and products. The introduction of PIA in the data protection legislation could help to identify specific technology related risks at an early stage. Privacy Enhancing Technologies (PETs) can support end-users' control over their private sphere while facilitating companies' privacy-compliant data processing.

SECURITY

In order to increase the trust and confidence of consumers in the information society, it is both necessary to continue and increase the fight against fraudulent behaviour that is becoming ever more sophisticated (phishing, pharming, spoofing, etc) as well as increase the protection of consumers (see

⁶ <http://www.quechoisir.org/Article.jsp?jsessionid=8DFED1AFBEF04C72369DF9971AEA2CA8.tomcat-1?id=Ressources:Articles:FAE1DB9DD1F603ECC125716C0053FBB6&catcss=IMA101&categorie=NoeudPClassement:5841FB0AEED2B5C9C1256F01003490F3>

also our position paper on the Review of the Telecom framework – Security and privacy (BEUC/X/063/2006).

MARKET SEGMENTATION

The technological development provides the consumers with new possibilities to shop on the Internet. This should mean advantages such as a bigger selection of products to choose from and lower prices. For example, Danish consumers pay a substantial higher price for a CD compared to the prices in countries like Sweden and Germany. The same scenario is seen in the market for films and DVDs. Part of this problem is caused by the market structure, part of it by law. The prices for downloading music are lower than for buying CDs, but still higher than the prices in online shops in other parts of the EU, and even higher than outside the EU. The reason for this is that downloading is restricted between the countries. Danish consumers are, therefore, not allowed to download music from foreign online shops. It would, therefore, be to the advantage of the consumers if they would be able to download music from online shops in other countries in the EU. If this is not possible due to the European copyright regime, the law should be changed.

On 24 February 2005, our UK member Which? also lodged a complaint against Apple's iTunes regarding territorial price discrimination. This price discrimination has led to isolation of the UK downloadable music market and overcharging of UK consumers.

A key question in this environment is how to translate traditional consumer protections and rights to new digital technologies.

Based on the above, areas that need special attention are:

- Promoting competition in the interests of consumers
- Promoting users' rights
- Access and Equity
- Pricing and Affordability
- Clear, Accessible Consumer Information
- Fair Terms and Contracts
- Fair technology
- Interoperability
- Use of Cultural and Creative Works
- Safety and Quality
- Redress
- Privacy & Security

Specific measures could include, among others:

- A clear right to copy legally obtained copyrighted works for private use
- An end to regional coding ('zoning') of DVDs, electronic games, audio books, music, and other digital material
- Limitations on legal protection of Technical Protection Measures (TPMs)
- A consumer rights charter
- Inclusion of technical codes (DRM) in unfair contract directive
- Producer's direct liability to facilitate redress in cross-border e-commerce
- Resale right of digitally purchased products
- Unit pricing for services
- Inclusion of software and data in the scope of the consumer sales Directive

5. How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?

See also question 4.

Often new technology and suitable content go hand in hand and restrictions are applied. But several examples for instance in the Netherlands show that in the longer run this does not prove to be a commercially successful strategy. For example one of the first ISP's in the Netherlands worked with a closed or semi closed system. Market pressures forced them to open up. Also on mobile internet, two of the largest mobile operators introduced mobile internet by using a closed environment. A third operator is using an open standard which proves to be successful.

But this is not merely a question of the success of a certain business models; access to information as well as cultural goods is an extremely important part of modern living. The industry's effort to strengthen excludability in the market is a fundamental challenge to the idea that access to information and cultural goods through the Internet is crucial to our society. The Access to Knowledge Treaty which is currently discussed among a broad range of different stakeholders takes account of the importance of open access and could be a useful source to the European Commission on how to enhance access to knowledge.⁷ In order to secure such access, the following considerations are important: ensuring access to scientific research and scientific publications for libraries and research institutions, like universities; ensuring access to Internet through public libraries and fostering the use of open source or freeware programs through public institutions like ministries etc. on their homepages, which will allow citizens to gain access to the information on these homepages no matter what kind of software they are using.

We urge the Commission to strongly push for open standards and interoperable platforms and devices in order to increase consumer trust in the digital world. So far and long enough, the industry is paying lip services to interoperability while basing their business models clearly on fenced devices or formats.

'Anytime', 'anywhere', 'any place' technologies, in other words, convergence will not be able to deliver its full potential for consumers if interoperability does not finally become reality.

For consumers the possibility to transfer content between different devices is of utmost importance. The digitally competent consumers have a wide range of different products he/she wishes to use their acquired content on (TVs, car stereos, PCs, portable gaming consoles, PDAs, MP3-players, cell phones etc.). Consumers do not consider it fair that online (and offline) content must be purchased for each specific device. The consequence is that consumers wanting to purchase content through services giving the creators and artists a fair share of the proceeds are being effectively pushed over to illegal (P2P) or semi-legal (Allofmp3.com) services where there are no problems with interoperability.

6. How far is cultural diversity self-sustaining online? Or should cultural diversity specifically be further fostered online? How can more people be enabled to share and circulate their own creative works? Is enough done to respect and enhance linguistic diversity?

We refer to our test on cultural diversity (http://www.consumersdigitalrights.org/cms/test_musique_en.php) as well as to our position paper on collective management of copyright (BEUC/X/029/2005) as an integral part of this submission. We point there to specific problems that arise in the context of cultural diversity.

On the other hand, the online world has experienced a democratisation of content distribution that has been unknown. MySpace and MyTube are synonyms for the social networking in the online world; Wikipedia, the Gutenberg project and open source projects are synonyms for collaborative innovation.

Europe has not shown remarkable creativity in finding new ways of distributing online content. What we do see in Europe are small-scale initiatives to bring consumers and artists closer together. In the Netherlands for example, sites like 'playmeloud' and 'shoutaband' are currently winning popularity amongst young consumers. On these sites, consumers are paying for content but no DRMs are incorporated, so consumers are not restricted in any way.

Unfortunately, these initiatives are often not self-sustaining. Perhaps the main challenge for these initiatives is to draw attention of their market to them. However, when they gain a wider audience, they

⁷ <http://www.cptech.org/a2k/>

are often taken over by the music industry. The big labels' track record in this area is revealing a certain tendency to take over start ups that gave unsigned bands the possibility to reach an audience⁸, or to fight them on legal basis.

Furthermore, the problem of orphan works and the protection of the public domain gain importance if one really aims at protecting cultural diversity. We believe that solutions are needed to protect the public domain, to deal with orphan works and also with user-generated content.

Another threat to cultural diversity is the lack of firm assurance by the legislature for the reuse of copyrighted material. An example is a young boy in the Netherlands who was a great fan of Harry Potter and had written his own sequel, was reprimanded by the right holder for violating their intellectual property. The boy did not have any commercial intent; nevertheless the site on which he provided his own version was taken down. This is a threat to cultural diversity as it may well mean an end to real creativity. The Commission should foster business models that open up to the endeavours of consumers to actively participate in content creation.

The problems of the world of bricks and mortar with scarce shelf and storage capacity no longer exist in an online world. Because of this, more obscure material is readily available for a much larger audience. According to the long tail view⁹, this will lead to a greater sale of marginal content. Thus, European content will benefit more from the wide online dissemination of cultural products than more mainstream US content. There is a risk though that this is not achieved due to policies either from the regulator or the industry that excessively restricts the dissemination of cultural products.¹⁰

Competitiveness of European online content industry

7. If you compare the online content industry in Europe with the same industry in other regions of the world, what in your opinion are the strengths and weaknesses of our industry in terms of competitiveness? Please give examples.

N.A.

New business models and transition of traditional ones into the digital world

8. Where do you see opportunities for new online content creation and distribution in the area of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?

N.A.

9. Please supply medium term forecasts on the evolution of demand for online content in your field of activity, if available.

N.A.

10. Are there any technological barriers (e.g. download and upload capacity, availability of software and other technological conditions such as interoperability, equipment, skills, other) to a more efficient online content creation and distribution? If so, please identify them.

Because of market segmentation, content is not distributed in an efficient way. The fact is that there are roughly three big DRM systems in the world today (Sony, Microsoft and Apple), and as long as these DRM systems relies on vertical distribution, online content creation and distributions are being

⁸ <http://diobach.com/2003/11/bye-bye-mp3.html>

⁹ <http://www.wired.com/wired/archive/12.10/tail.html>

hampered. This combined with the fact that some devices do not support DRMs will keep consumers from going from shop to shop for the best deal; this is bad for competition and leads to consumer 'lock in'.

Because user-generated content is growing, there is also a growing need for symmetric broadband made available to consumers allowing the same speed/bandwidth for down- and uploading.

11. What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of the different players to secure a sustainable revenue chain for creation and distribution online?

Creative people deserve a fair compensation, and consumers deserve value for money. This means that consumers should also profit from a more efficient distribution of content through the internet. An attractive offer is the only solution. This means a minimum of hindrance (no unnecessary technical measures). Providers should abandon the notion that online content cannibalizes on other forms of content. This notion is not correct and has market and time segmentation as consequence. Segmentation makes online content unattractive, with less revenue as consequence.

Payment and price systems

12. What kinds of payment systems are used in your field of activity and in the country or countries you operate in? How could payment systems be improved?

In Denmark for example, consumers pay a charge of a minimum of Euro 0,26 per deal + either 0,1% or 1,25% of the price of the product when buying online. The PBS (the electronic payment system of the Danish banks) collects the charge. The Danish Competition Authorities are examining whether the charge is matching the operating costs of the system. It is necessary that these charges are kept as low as possible to avoid that they present a barrier to sales on the Internet.

13. What kinds of pricing systems or strategies are used in your field of activity? How could these be improved?

N.A.

Licensing, rights clearance, right holders remuneration

14. Would creative businesses benefit from Europe-wide or multi-territory licensing and clearance? If so, what would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?

Rights clearance in the online world is crucial for consumers to benefit from a broad variety of content.

Efficiency and transparency are central.

In theory, multi-territory licensing will create a larger market for the artists; it means more efficiency and lower pricing through less overhead costs. Yet, there is a considerable risk that larger collecting societies will concentrate mainly on mainstream content and not on local or artistic/innovative (avant-garde) content. At least for such content, it is questionable whether consumers will obtain access to an even larger number of artists and a broader variety of music, films etc. as long as business models are based on national segmentations, enabled through the national copyright regimes.

We refer to our position paper on collective management of copyright (BEUC/X/029/2005) in the context of the recent recommendation on management of online rights in musical works.

The recommendation has left many questions unanswered and only covers the online sale of music. Similar questions arise in the context of other content as for example online broadcasting.

15. Are there any problems concerning licensing and / or effective rights clearance in the sector and in the country or countries you operate in? How could these problems be solved?

N.A.

16. How should the distribution of creative content online be taken into account in the remuneration of the right holders? What should be the consequences of convergence in terms of right holders' remuneration (levy systems, new forms of compensation for authorised / unauthorised private copy, etc.)?

Before these questions can be answered, it is necessary to clarify users' rights in the online world. There are a lot of myths and threats ("downloading is stealing", etc.) and legal uncertainty is counterproductive to the up-take of content online.

Fairness needs to be applied in both direction and it must be avoided that users feel ripped off.

Private copying in the digital form needs to enable consumers to use the content. The presence of a private copy exemption formulated as a defence rather than an affirmative right is hindering legal clarity and adds to the ambiguity of users' rights in the digital environment. Strong rights are therefore essential to enable the demand side to reward competitiveness in the content sector. These rights include time-shifting, space- shifting, format changing, lending, etc.

It must also be clearly established under which circumstances the *de minimis* rule is triggered and remuneration not due. We refer to our position paper on copyright levies - Response to the Questionnaire BEUC/X/ 047/2006.

Second, the European Commission urgently needs to take stock of alternative remuneration schemes and alternative forms of licensing and give a platform to those stakeholders that have proposed schemes to remunerate or compensate rights holders in the digital world without restricting users' rights unnecessarily.

Among the propositions currently discussed are the global license, proposed by the French Public-Artist alliance;¹¹ the flat rate proposed by the Berlin Declaration,¹² and the proposal to monetise digital distribution by IMPALA.

Other schemes currently researched by scholars must also be taken into account such as the pilot project launched by Harvard's Berkman Centre for Internet and Society. This scheme is based on a tax and royalty system. Structurally, the system functions as a non-profit wholesale cooperative for the exchange of digital recordings. Their recordings are deposited by content providers (existing copyright holders and intermediaries such as music publishers, film studios, record companies, etc) then distributed by access providers (broadband suppliers, mobile phone providers, universities and individual firms). The subscribers are members of the public who share works through peer-to-peer networks and obtain licences. Their behaviour is tracked so as to monitor the frequency of use of particular works. Members pay their access providers who in turned pay the cooperative, 85% of the proceeds going to the content owners and 15% to the company that operate the system (which might be a profit-making enterprise in each jurisdiction). To address the moral rights issue, the licences at the foundation of this new regime comes in two forms, one with a higher rate of return for artists who assigned all reproductive rights to the cooperative (including, in particular, the right to prepare derivative work).¹³ Another scheme is the German potato system, developed by the "Frauenhofer Institut".¹⁴

We do by no means claim that this list is exhaustive nor do we at this stage promote one specific solution. However, considering the variety of proposals discussed, there is a considerable chance that other solutions are more consumer friendly than the DRM business models that are so strongly pushed by the industry (and the Commission).

¹¹ <http://alliance.bugiweb.com/phpPetitions/>

¹² <http://www.privatkopie.net/files/BerlinDeclaration-ACS-PM.pdf>

¹³ This scheme has been presented by law professor Terry Fisher at the TACD meeting "New relationship between creative communities and consumers, June 19-20, 2006, Paris. See <http://www.tacd.org/events/creative-communities/meeting-report.htm#1>

¹⁴ <http://www.potatosystem.com/info/de/>

We urge the European Commission to open the debate to alternative forms of remuneration and compensation systems, and to stop fostering one business model without adequately considering others.

Legal or regulatory barriers

17. Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?

In the long run, the European Community needs a uniform copyright regime if it wants to complete the internal market for creative works.

Legal uncertainties as to the management of works whose authors are unknown (orphan works) clearly have hampered the up-take of digital archives.

18. How does the country you mainly operate in encourage the development of creative online content and services?

N.A.

Release windows

19. Are “release windows” applicable to your business model? If so, how do you assess the functioning of the system? Do you have proposals to improve it where necessary? Do you think release windows still make sense in the online environment? Would other models be appropriate?

Release windows are out of date. Consumers desire to access content as soon as it becomes available, here and now and are willing to pay for it, if it is delivered in a way and form that suits their needs.

Recently, this has been recognized by the UK film minister, Shaun Woodward: “Making films available on demand as soon as they are released at cinemas could help stop fans watching illegal copies”, he said.¹⁵

Networks

20. The Internet is currently based on the principle of "network neutrality", with all data moving around the system treated equally. One of the ideas being floated is that network operators should be allowed to offer preferential, high-quality services to some service providers instead of providing a neutral service. What is your position on this issue?

We strongly object such an idea. Network neutrality is key to the Internet's success designed to maximize user choice and innovation. It is important to note that innovation and creativity has been the engine of the Internet - based on the neutrality of the network. Net neutrality has enabled actors, without strong economic resources to be part of the development. This end-to-end architecture has been an important basis for the development of new services like the World Wide Web, but also for the role of the Internet as the most important provider of information to the populations of our time.

It would be very harmful if the big players in the content industry would get premium access to subscribers to “neutral” networks. Access-tiering would be harmful to innovation. As Lawrence Lessig has formulated it in a Hearing before the Senate Committee on Commerce, Science and Transportation:

¹⁵ <http://news.bbc.co.uk/1/hi/entertainment/6044980.stm>.

“Consumer-tiering, however, should not discriminate among content or application providers. There’s nothing wrong with network owners saying “we’ll guarantee fast video service on your broadband account.” There is something wrong with network owners saying “we’ll guarantee fast video service from NBC on your broadband account.” And there is something especially wrong with network owners telling content or service providers that they can’t access a meaningful broadband network unless they pay an access tax.”¹⁶

The four Internet freedom principles¹⁷ developed by former US Federal Communications Commission (FCC) chairman Michael K. Powell in February 2004 are central. In addition, it may be pre-cautious to request the preservation of net-neutrality through a clear ban on access-tiering by network providers. Also, the more consumers rely on broadband, the more important it will be to guarantee a universal broadband service.

Piracy and unauthorised uploading and downloading of copyright protected works

21. To what extent does your business model suffer from piracy (physical and/or online)? What kinds of action to curb piracy are taken in your sector/field of activity and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between "small" and "big" ones?

While music industry has successfully flawed any clear terminology to distinguish commercial copyright infringement, non-commercial copyright infringement and private uses, we reiterate:

Unauthorised uploading of copy-protected works is infringing the making available right of the content owner which has been introduced by the 2001 Copyright Directive.

The act of downloading of files containing music, film, photographs, software or text constitutes an act of reproduction. It thus clearly falls within exclusive rights of copy-protected content under current law. Consequently, if done in one’s private sphere, it raises the question whether the prohibition to reproduce without the authorization of the content owner is exempted by the private copy exception. Downloading content without authorization can thus arguably fall under the private copy exception. We acknowledge that there are legal uncertainties as to the lawfulness of the source and as to the three step test; however these obstacles can be clarified.¹⁸ However, the clarification or extension of private copying mechanism to the act of downloading would clear legal uncertainty, stop civil and criminal prosecution waves against small infringers and help them to concentrate on real commercial infringers.

Once it has been clarified that unauthorised downloading falls under the private copy exemption, the question as to the damage is obsolete.

As to the damage of unauthorized uploading, recent business reports show that online services offered by the big labels have already taken up and that losses in CD sales are by now compensated through online offers. This statement is also coherent with the technological cycles of media devices as shown in a recent provisional study result undertaken on behalf of the European Commission.¹⁹

In any event, those who make copy-protected content available for downloading cause significantly more harm than those who download within the private sphere.

¹⁶ Testimony of Lawrence Lessig, a.o. Senate Committee on Commerce, Science and Transportation; Hearing on “Network Neutrality” February 7, 2006.

¹⁷ Remarks of Michael K. Powell, Chairman, Federal Communications Commission; At the Silicon Flatirons Symposium on “The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age”; University of Colorado School of Law; Boulder, Colorado; February 8, 2004.

¹⁸ http://privatkopie.net/files/Feasibility-Study-p2p-acs_Nantes.pdf

¹⁹ <http://xml.nada.kth.se/media/Research/MusicLessons/>.

We encourage the European Commission to make a clear distinction between commercial and non-commercial infringement of copyright, and in addition, to stress that many non-commercial uses in fact are not infringements but exempted of the exclusive right. And the Commission should not use a term such as “piracy” in the context of organized crime and consumers alike. In the context of criminal measures we refer to our position paper on the amended proposal for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property – BEUC/X/054/2006.

The consequences of illegal filesharing have not been adequately assessed by the Commission. Before any further steps against filesharing are taken, an appraisal based on empirical evidence from neutral sources must be done. Furthermore, the assessment must take into account the positive aspects of filesharing. For instance peer-to-peer networks are disseminating European culture on a scale and to a wider audience than ever before.

22. To what extent do education and awareness-raising campaigns concerning respect for copyright contribute to limiting piracy in the country or countries you operate in? Do you have specific proposals in this respect?

As mentioned in the answer to question 4 we believe that consumer education must be on consumer rights. As far as awareness raising campaign are concerned, there are many campaigns about these issues all over Europe but they do not seem to land within the minds of most people; in fact, they are sometimes considered to be unethical. The European Commission should be wary to associate itself with this kind of campaigning. Maybe the industry should put its money into the development of new business models that deliver what consumers want, rather than criminalizing consumers.

23. Could peer-to-peer technologies be used in such a way that the owners of copyrighted material are adequately protected in your field of activity and in the country or countries you operate in? Does peer-to-peer file sharing (also of uncopyrighted material) reveal new business models? If so, please describe them?

Commission policies in general and this questionnaire in particular fails to acknowledge the positive impacts of peer-to-peer software on driving greater band width, promoting a culture of collaboration and sharing to the benefit of both consumers and businesses.

Peer-to-peer is a distribution technology. See question 16.

Rating or classification

24. Is rating or classification of content an issue for your business? Do the different national practices concerning classification cause any problem for the free movement of creative services? How is classification ensured in your business (self-regulation, co-regulation)?

N.A.

Digital Rights Management systems (DRMs)

25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?

DRMs may have a role to play in distributing content to consumers, but experience so far means that they need to be regulated. DRMs that do not meet the regulated standards should at the least not get anti-circumvention protection. DRMs have so far not proven to be appropriate means to manage and secure the distribution of copyrighted material in the online environment. In fact, virtually every form of DRM has been decrypted, including Microsoft's WMA files. Just recently Jon Johansen has decoded

the encryption that locks down iTunes-purchased music.²⁰ In essence, DRM do support business models not copy protection.

Not all digital music consumers are aware of these workarounds, but tend to discover them the minute they find they can't play their music on their device of choice (see also our studies conducted in the context of our consumer digital rights campaign, available at: http://www.consumersdigitalrights.org/cms/test_interop_en.php).

26. Do you have access to robust DRM systems providing what you consider to be an appropriate level of protection? If not, what is the reason for that? What are the consequences for you of not having access to a robust DRM system?

Current DRMs have failed to achieve their goal (prevention of illegitimate copying). Meanwhile they did succeed in limiting legitimate usage by consumers. In this sense consumer interests are being violated.

27. In the sector and in the country or countries you operate in, are DRMs widely used? Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?

See question 4.

28. Do you use copy protection measures? To what extent is such copy protection accepted by others in the sector and in the country or countries you operate in?

See question 4.

29. Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability?

See question 4.

Complementing commercial offers with non-commercial services

30. In which way can non-commercial services, such as opening archives online (public/private partnerships) complement commercial offers to consumers in the sector you operate in?

N.A.

What role for equipment and software manufacturers?

31. How could European equipment and software manufacturers take full advantage of the creation and distribution of creative content and services online (devices, DRMs, etc.)?

N.A.

What role for public authorities?

32. What could be the role of national governments / regional entities to foster new business models in the online environment (broadband deployment, inclusion, etc.)?

Online content could be a very important factor for innovation and economic growth. National governments should continuously monitor developments and invest in research. It is crucial in these fast moving markets to have an evidence- based policy towards online content.

²⁰ http://www.theregister.co.uk/2006/10/26/dvd_jon_fairplay/

We believe that there is a unique chance for the Commission to rebalance the interest of the public taking into account the Declaration of consumer rights in view of the review of the consumer law acquis and the recast of the IP law acquis.

33. What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?

See question 4 and 32.

END