

ETNO Reflection Document in reply to the public consultation on Content Online in the Single Market

Executive Summary:

Online content markets are growing with extraordinary speed. As the introduction to DG INFSO's questionnaire itself notes, the size of these markets in Western Europe is expected to triple by 2008.

In a rapidly-changing area characterised by multiple uncertainties, it is particularly important that any interventions are evidence-based, properly-targeted, and in full conformity with the subsidiarity principle. This needs to be consistent with existing policy initiatives - including those where Commission departments other than DG INFSO have the lead.

Introduction

Online content markets are growing with extraordinary speed. As the introduction to DG INFSO's questionnaire itself notes, the size of these markets in Western Europe is expected to triple by 2008. This trend is confirmed by anecdotal evidence: few days pass without the launch of a new product or service, or the announcement of a major deal. A complex new ecosystem is clearly starting to evolve, though nobody is yet able reliably to predict its future shape, or to forecast which business models will be successful.

In such a fast-moving environment the need for specific intervention by public authorities to encourage market development is not self-evident. Indeed, there is a high risk that well-intentioned actions will produce counterproductive unintended consequences. The danger is particularly acute where such interventions seek simply to transfer legacy regulatory frameworks to a sector with future characteristics that remain largely unknown (the proposal for revision of the TV without Frontiers Directive is a case in point). Use of public policy to defend or encourage specific business models or technologies is also likely to have damaging consequences.

These considerations do not mean that ETNO is opposed to an EU role in the field. However, in a rapidly-changing area characterised by multiple uncertainties, it is particularly important that any interventions are evidence-based, properly-targeted, and in full conformity with the subsidiarity principle. It is equally important to ensure consistency with existing policy initiatives - including those where Commission departments other than DG INFSO have the lead.

Against this background, DG INFSO Questionnaire's lack of clear focus and the absence of supporting discussion is a source of concern. An open-ended debate which seeks evidence and opinions from the widest possible group of stakeholders is certainly timely and necessary. However, the declared timetable for production of a follow-up Communication will allow only a very short interval for intra-Commission reflection and discussion on the inputs received.

With these caveats in mind, the common views of ETNO Members on the main themes addressed by the Questionnaire are set out in the following sections.

Data protection

- ETNO agrees that the profile of data protection issues is likely to rise as online content markets develop. Increased use of electronic networks to consume content necessarily provides more scope for the gathering of customer information. However, the Association does not believe that new legislation is required to protect citizen interests and maintain consumer confidence in new services. The focus must instead be on effective enforcement of existing rules.

Content licensing

- Collecting society policies and practices have been a significant obstacle to the launch of new services. The inability of some rightsholders to bypass collective management and deal directly with digital distributors remains a concern. Against this background, ETNO strongly supports efforts by DG MARKET and DG COMP to introduce greater competition and transparency into collecting society operations - notably the 2005 Recommendation on cross-border licensing. This initiative now merits determined and robust follow-up.
- With regard to individually-managed rights, the potential for anti-competitive practices by owners of premium content remains a concern for ETNO Members - though these concerns are generally less acute than previously. In any case, action to deal with these concerns is a matter for competition law rather than new sector-specific policy initiatives.
- With regard to the question of pan-European licensing, the current ETNO position is agnostic. On the one hand, the overall potential for development of pan-European services should not be over-estimated and account should be taken of the fact that this is an area with particular scope for unintended consequences. On the other hand, the matter is of importance to certain stakeholders including some ETNO Members. The

Commission should therefore proceed with caution, basing policy on a proper cost-benefit analysis rather than a purely ideological commitment to European integration.

- With regard to the question of rights clearance, ETNO agrees that current procedures are often overly-complicated and lengthy. There may be a role for the Commission in this area - perhaps as a facilitator for the exchange of best practice and experience.

Copyright infringement

- The EU legal framework - notably the E-Commerce Directive and the Directive on IPR Enforcement - already allows for effective legal action against copyright infringement. ETNO Members are committed to their responsibilities under this framework which balances the interests of rightsholders against other considerations - notably the rights of law-abiding telecoms users and society's need for an open "common carrier" electronic communications platform.
- Proposals for a "graduated response" that were advanced in the context of the Film Online debate will require ISPs to take decisions on the validity of rightsholder complaints that are properly taken by a court, thereby "privatising" the administration of justice and shifting the costs of enforcement from rightsholders to ISPs. In other words, ISPs are being asked to provide a service to rightsholders. It follows that if the graduated response is to be discussed at all (it is probably illegal in some Member States), it is necessarily a matter for bilateral commercial negotiation.
- Claims continue to be made that ISPs have a moral obligation voluntarily to accept a larger share of enforcement costs since they profit from copyright infringement. Such claims have no foundation in the economics of IP networks. In fact, heavy use of P2P networks by copyright infringers adds significantly to ISP backhaul costs.

DRM interoperability

- ETNO strongly supports the goal of DRM interoperability (we define "interoperability" in this context to mean the ability of users to consume content on the device of their choice, irrespective of its source). Achievement of this goal will favour a user-friendly customer experience, thereby encouraging market growth. Policy on this issue needs to be developed with the following points in mind:
 - It is important to avoid confusing technical incompatibility issues and the lack of interoperability which results from use of DRM systems to implement specific business models. The latter obstacle is a matter for the market. If consumers truly value interoperability, vendors with the most flexible offerings will be those that thrive.
 - Any lack of interoperability resulting from use of proprietary standards is a matter for competition policy. More specifically, intervention will only be appropriate where abuse of a dominant position can be demonstrated.

- Any lack of interoperability resulting from incompatibilities between open standards is not a matter for public policy intervention. Any attempt to favour a particular standard risks impeding investment and innovation. It will also heighten security risks by introducing the same vulnerabilities to all content and systems.

Net neutrality

- ETNO regrets the misleading formulation of this issue in Question 20 (the Internet is not based on the principle of net neutrality as defined in the question and network operators are already allowed to offer preferential, high quality service to some service providers). We are also puzzled by the reasons for its inclusion. To the extent it needs to be examined at all in Europe, the net neutrality question is already being discussed as part of the 2006 Review of the EU E-Communications Framework and it should be settled in the same context. The opening of a separate debate elsewhere risks creating uncertainty for all the economic actors involved. ETNO's detailed comments on the question will be made in the Association's response to the current DG INFSO consultation on the 2006 Review.

Cultural diversity

- The "long tail" effects already apparent in current online media distribution initiatives lead ETNO Members to conclude that future online content markets will provide consumers with unprecedented choice - both in terms of the quantity and variety of content that they are able to access. In other words, cultural diversity will be self-sustaining.
- Special attention needs to be given to the competition-distorting effects of publicly-funded content. On the one hand, public funding should not privilege certain technology platforms (eg, "must carry" rights for public broadcasters need to be balanced by "must provide" obligations). On the other hand, initiatives to promote on-demand availability of publicly-funded content that was originally produced for broadcast purposes must not be allowed to stifle commercial activities in the on-demand sector.

DRM and rightsholder remuneration

- Existing DRM deployments provide firm evidence of the technology's capacity to guarantee rightsholders' remuneration, and to protect against illegal copying of work. Against this background, ETNO strongly supports efforts by DG MARKT to ensure proper implementation of Article 5.1 of the EU Copyright Directive so that the incidence of levies is correctly linked to DRM use. There can be no doubt that, when used in parallel with DRM, levies are unnecessarily raising the price of digital products and services, thereby impeding the development of online content markets.