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EuroISPA Response to the European Commission's Consultation on:
A Communication on CONTENT ONLINE

EuroISPA is the world's largest association of Internet Service Providers, representing more than 900 ISPs across the EU. Below is our contribution to the Commission's consultation on Content Online, in respect of some of the most pertinent points for our members.

Introduction

EuroISPA welcomes the Commission's public consultations on complex issues that require the input of all relevant stakeholders.

That said, EuroISPA has two substantial concerns about the present consultation:

- (i) The consultation document addresses many issues that are subject to existing EU legislation, draft policy or legislative proposals and ongoing discussions with stakeholders that are being led by other European Commission Directorates-General or other units within DG Information Society & Media. The consultation document does not convey how the present consultation relates to other existing or ongoing initiatives.
- (ii) While we thank the Commission for the opportunity to comment at this stage, EuroISPA is concerned at the Commission's ambition to publish a Communication before the end of the 2006. Responses to the present consultation are likely to come from a wide range of stakeholders, most with positive yet varied ideas about the future of online content, as was reflected in the 11 October Public Hearing. Given the likelihood of wide-ranging and numerous responses on such a broad range of issues, we are concerned that the Communication is unlikely to be able take adequate account of views all stakeholders within such a short time-frame.

Commission Question 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.*

EuroISPA notes the Commission's focus on content for which the providers will be directly remunerated by consumers. However, EuroISPA strongly believes that new online services will equally be driven by business models that are based on free-to-air content, including those supported by advertising. The consultation document contains very little consideration of the business models that put millions of short clips online, whether made professionally or by "amateurs" and the policy needs for EU-based providers relative to the rest of this global market. Given the lasting success stories of such business models to date, EuroISPA would like to see the Commission encourage these creative phenomena in the same way as it promotes paid-for and subscription-based services. This gives added support for calls to liberalise

advertising rules, otherwise online content platforms are likely to be more easily established in other parts of the world where different regulatory standards apply.

EuroISPA also notes that public sector information forms a valuable area of content online. We encourage the Commission to address the lack of consistent rules across the European Union in relation to the use of such content.

Commission Question 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.*

EuroISPA is concerned that the stability and clarity of the country-of-origin principle on which the success of the internal market – and particularly the internal market for on-line services - is based, is in danger of being eroded by a number of proposals currently in the pipeline. We fear that crucial aspects of the resulting body of legislation may not serve as an incentive for the dynamic growth of e-commerce, but may conversely establish new barriers to entry for service providers wanting to roll-out new e-services, and indeed risks undermining the very directive – the E-Commerce directive – which has supported Europe's success. For a confident online market to flourish, industry must be certain that the country-of-origin principle, as enshrined in the E-Commerce Directive, is unaffected. Upcoming and future legislation that is based on a country-of-reception rule will erode the security of the e-commerce Directive's provisions, while legislation that is insufficiently clear on the precedence of the country-of-origin principle is equally as damaging for online-services. In particular, EuroISPA is extremely worried about the potential impact of initiatives such as: Rome I - Proposal for a Regulation on the law applicable to contractual obligations; Rome II - Proposal for a Regulation on the law applicable to non-contractual obligations; and the Audiovisual media services (AVMS) directive.

Consumer protection and trust:

EuroISPA recognises the essential role of consumer trust in developing our industry. We acknowledge that a borderless, pan-European sense of trust in online services needs to be fostered to allow the Internal Market to flourish. This includes the need to better inform consumers that they are adequately protected by the laws of all EU Member States. EuroISPA and its members are fully committed to fostering best practice in order to boost consumer confidence and to continuing our support for the development of easy-to-use and effective tools to enhance security and trust.

In respect of legislation to protect users, there is already a very considerable body of consumer protection law developed over recent years at the EU-level. These include directives which lay down the rules and obligations on a Europe-wide basis for distance selling, contract terms, product safety, product liability and guarantees. All EU consumers are protected both at home and in the intra-EU cross-border context by this body of EU consumer protection regulation and by consumer protection provisions within a wider range of Community instruments, such as the E-Commerce Directive. This comprehensive catalogue of laws – only recently completed by the Unfair Commercial Practices Directive whose very purpose is to fill in any gaps left open to rogues - offers a clear and robust framework of protection for all EU consumers. After all, consumers as well as businesses need a predictable legal framework in order to better reap the benefits of the information society.

Interrelation with the competitive situation in the access broadband market:

The Commission should also address the competitive scenario existing in the broadband access market. Although this issue falls within the ambit of the application of the Electronic Communications Regulatory Framework that is currently subject to a review to which EuroISPA will contribute, it is clear that a

sustainable competition in the access market it is a basic pre-condition for the corresponding development and growth of online content and services. Accordingly, where the access market is suffering distortions such as a lack of interoperability between services and infrastructures, enhanced vertical integrations of the incumbent or pricing and quality issues for bitstream offers, online content and service development will be hindered.

Commission Question 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?*

EuroISPA addressed the question of cultural diversity online in the context of the European Commission's consultation on the proposal to amend the Television without Frontiers Directive. In the context of the ensuing debates and the current situation in the marketplace, we remain totally convinced of the following position on this subject.

The European Commission's most recent reports on the functioning of quota obligations under the existing Television without Frontiers Directive reported that the thresholds were largely exceeded by broadcasters. In other words, the natural demand for European content exceeds the quota levels that reflect agreed-upon public policy goals in this area. It follows therefore that demand for European productions is being driven by the proliferation of channels rather than by the quotas themselves. Diversity of content is even more apparent in the online space, where the web has facilitated an increase in content relating to European culture in all languages.

This finding is significant because the Internet offers scope for the much wider availability of multi-channel television, and this has for example been very evident in France. IP networks are therefore already contributing substantially to an increase in demand for European works. However, the really exciting prospect for European works clearly lies in the non-linear world. Whether generalist services models emerge that naturally have a substantial proportion of European works like today's TV channels do, or whether the market fragments into niche propositions (some focusing on EU content, others on non-EU contents) remains to be seen. But in either case the traditional broadcasting "access" bottleneck for European works should disappear. The Internet's ability to support niche markets is often referred to in discussion about the so-called "Long Tail"¹, which emphasises the impact of lifting the physical constraints on commerce (e.g. shelf space) by moving online. A few examples of the Long Tail in operation are included in the box above.

Long tail examples

- US DVD-by-post company Netflix delivers thousands of rentals of films unavailable in local DVD rental shops;
- The average US bookshop carries 130,000 books, but over a half of Amazon's sales are of books not in this 130,000;
- Rhapsody, an online music store, reports that every one of its top 400,000 tracks are download frequently;
- Google makes most of its money by enabling an army of small companies to advertise.

If European works are no longer constrained in reaching their full audience, they should be able to achieve greater revenues. In other words, the non-linear medium provides a market based contribution to both the access and production of European works. This is the right way to go forward, and EU legislation should focus on the creation of a platform of legal certainty to encourage the development of such services.

Bottlenecks:

¹ <http://www.wired.com/wired/archive/12.10/tail.html>

As mentioned above, the key issue is that traditional content distribution bottlenecks do not exist in the Internet world. The European Commission continues to support a balanced approach to sector-specific regulation in the electronic communications sector. The Commission has adopted this strategy in view of the necessity for sustainable competition in the broadband Internet access market, as this sector is a key driver needed to ensure the fulfilment of the Lisbon goals. Broadband access bottlenecks would be disastrous for the long-term European creative content industry and EuroISPA will offer the Commission detailed feedback supporting the maintenance of its current regulatory aims will help to avoid this, in the consultation on the Review of the Electronic Communications Regulatory Framework.

Commission Question 18: *How does the country you mainly operate in encourage the development of creative online content and services?*

Further to our answer to question 2, EuroISPA would like to note some additional issues in relation to "free-to-air" models for content distribution. We believe it is essential for the Commission to consider the huge value that such business models can bring to the online content services sector. EuroISPA believes such considerations were also lacking from the proposal for a new Audiovisual Media Services Directive.

It is important because without such consideration, these businesses have an increasingly uncertain legal environment in which to operate. Their revenues will often be based on advertising, but the rules governing advertising are becoming increasingly complex: the proposed amendments to the TVWF Directive raise questions of what can be advertised, EU legislation containing marketing rules raises doubts about the messages that can be used, whilst the data protection Directives are unclear about how targeted the advertising may be.

In addition, we are worried about the inappropriate use of the term "level playing-field". This is sometimes used to justify extending regulation originally designed for other sectors to the online world, although EuroISPA believes this can result in unfair protectionism of established industries. The reality is that the emerging European talent usually has to live off the success of their product, whereas in some European countries the established content producers often have access to a generous regime of subsidies that consumers have to pay into. We fail to see how this creates a level playing-field for innovative services. Our answer to question 33 is also relevant to this issue.

Commission Question 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?*

EuroISPA is very confused about why the Commission is asking such a broad question on net neutrality within the context of this consultation. Indications from the Commission within the context of the Review of the Electronic Communications Regulatory Framework have sought to play down the debate about net neutrality and focus on some "Europeanised" aspects of the issue. The broad question in this consultation underlines the basis for the concern expressed in our introduction about the possible duplication or lack of coordination in the approaches to specific issues that overlap Commission Directorates-General. We will therefore answer the Commission's question in the consultation on the Review of the Electronic Communications Regulatory Framework, since the question is at that time most relevant to the Access and Interconnection Directive.

Piracy and unauthorised uploading and downloading of copyright protected works: Commission Questions 21-23.

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?

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?

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?

EuroISPA firmly denounces online piracy in the same way as any other infringement of the law. Indeed, ISPs suffer costs as a result of piracy practices, such as extra and non-remunerated bandwidth usage.

EuroISPA agrees that it is in all stakeholders' interests to address the problem of piracy. EuroISPA and national ISP associations have demonstrated a clear willingness to engage in discussions to find appropriate mechanisms to counter piracy. From what we understand of the discussions that took place between invited participants on the Film Online Charter, talks highlighted the difficulties and the limitations of different approaches in different Member States. We believe this is a further illustration of the need to engage European associations such as EuroISPA in such debates, in order to explore coordinated ways forward. At the same time, our member associations continue to engage constructively to explore possible initiatives at national level, with the various right holder communities and other stakeholders.

EuroISPA finds it deeply frustrating and regrettable that its members are sometimes accused of hiding behind legal provisions. ISPs are often faced with a complex legal situation comprising, as a minimum, national legislation on data protection and intellectual property, whose provisions and/or implementation may or may not be as a result of, or in line with, the applicable EU Directives. In line with the provisions of the IPR Enforcement Directive, ISPs should not be expected to act as “judge and jury”, and should not be expected to act without the necessary legal certainty that they will not be liable for the incursion on another party's rights.

In terms of splitting counter-piracy actions according to whether the targets are “small” or “large” infringers, EuroISPA believes this reflects our current supported approaches to the issue. The vast majority of Internet users wish to engage only in lawful activity online. It is clear that education and awareness campaigns concerning consumers' rights and obligations in their use of material protected by intellectual property rights are imperative. At the same time, EuroISPA notes the surges in consumption of highly successful, legal online services and believes this is an indication that consumers are eager to see the increased availability of content, for which they are prepared to pay. There are other issues that need to be worked out in order to facilitate further rollout of these services, such as DRMs and cross-border licensing, which are currently subject to work in other Commission Directorates-General.

All stakeholders also acknowledge there are individuals or groups who wish to exploit online technologies to commit infringements without any regard for the interests of right holders or other potential beneficiaries of successful online services, including ISPs. EuroISPA believes it is essential to ensure there is a clear and firm legal framework that allows for such intentional offenders to be successfully and promptly acted against.

Finally, peer-to-peer technologies are vitally important to facilitate innovative online services. Peer-to-peer should not be identified as synonymous with intellectual property rights infringements.

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

As noted above, broadband deployment is a basic condition for the development of new services. There are numerous initiatives already in existence to promote the aggressive rollout and uptake of broadband, not least the regulatory framework for electronic communications, which aims to enable sustainable competition in the sector, and the i2010 initiative, which sets specific targets for broadband penetration. Such initiatives remain extremely important to avoid distribution bottlenecks and lay a platform on which innovative services may flourish.

Commission Question 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?*

EuroISPA firmly believes there must be better coordination of EU policy and legislation to address issues regarding the electronic communications and services sectors. Currently, our experience is of a disjointed policy approach that offers increasing legal uncertainty to our members and consumers of electronic content. Uncertainty also impacts the investment or establishment decisions of those electronic service providers that use our members' services, which is of direct importance to the EU Member States' economies, given that many such service providers are significant employers. We therefore urge the Commission to improve its long-term strategy towards the Internet industry and economy to foster the development of European online services.

The EU regulatory framework for electronic communications, when properly implemented, sets a sound basis to deal with competition issues in the broadband sector if market analyses show there to be a problem. The Electronic Commerce Directive is likewise a keystone in building an appropriate legal framework: it set down basic parameters to give legal certainty on a number of key issues. EuroISPA hopes the Commission will not seek any drastic change to either of these policy and legislative cornerstones in their respective reviews over the coming two years.

These Directives represent simple, clear, well-balanced legislative backdrops, giving new services legal certainty whilst establishing a basic platform from which they are encouraged to develop. EuroISPA remains very concerned about recent initiatives that we believe will damage or inhibit our industry. The draft Audiovisual Media Services Directive and the draft Rome I and Rome II Regulations are examples of instruments that threaten to erode the basic principle of the country of origin in favour of a short-term or protectionist interest. If the political commitments towards a prosperous and forward-looking information society that were made in the context of the i2010 initiative are to be maintained, industry needs the Commission to ensure specific policy measures contain a much more coordinated approach that promotes legal certainty, balance between the interests of all stakeholders, and long-term industry development.

About EuroISPA:

EuroISPA is the world's largest association of Internet Service Providers, representing approximately 900 ISPs across the EU. EuroISPA is a major voice of the Internet industry on information society subjects such as cybercrime, data protection, e-commerce regulation, EU telecommunications law and safe use of the Internet. Its secretariat is located in Brussels.

EuroISPA is predominantly funded by its member and associate member associations and the members of the EuroISPA Industry Forum.

For further information on this and other matters concerning EuroISPA, please contact Richard Nash, Regulatory Affairs Manager and Secretary General, at the address set out below.