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European Commission Online Commerce Roundtable Consultation June 2009 + EC eYouGuide and EC Digital Agenda / Online Commerce related priorities : Ericsson comments

1 Online Commerce Roundtable conclusions on opportunities and barriers to online retailing – European Commission consultation

On May 26, 2009 the European Commission, DG Competition opened a consultation on the conclusions of the online commerce roundtable on the online distribution of music.

Ericsson appreciates the opportunity to provide feedback to the Commission consultation regarding the online commerce roundtable initiative. As a leading provider of telecom infrastructure, including IPTV and Mobile TV, we would like to take the opportunity to comment on how the evolving IP based technologies are changing the scope of communications, including the traditional form of media distribution and broadcasting. Ericsson would like to stress the importance of this and other related initiatives (points 2-3 below) for the European economy and citizens, which will allow European consumers to fully benefit from paid-for, advertised sponsored and for-free content, whether it is commercial or public, through a wide set of interactive applications and devices. Our comments focus on how to best achieve fast take-up of these new services and at the same time strengthen consumers' confidence in adequate legal regime.

As a stakeholder in the field of online services and Internet technologies Ericsson is pleased that Ms Neelie Kroes, Commissioner for Competition, has acknowledged the fact that major players in the online distribution of music in Europe clearly want to address the barriers that are preventing consumers from fully benefiting from the opportunities of the Internet. Ericsson fully supports the request to music publishers and collecting societies to rapidly adapt their licensing solutions to the online environment. Ericsson is looking forward to further progress on this important issue.

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Unlike the vibrant US online market EU consumers are often only allowed to buy copyright protected content from websites that are directed to their country of residence. This is the case for music as well as other forms of creative content. This problem originates from the fact that online retailers of protected content cannot sell their content to all EU consumers at the same price because they cannot obtain the rights under the same terms in all the EU Member States. These rights involve a fragmented scene of record companies, collecting societies, producers, performers and others.

Ericsson acknowledges earlier steps taken (Commission Recommendation of October 18, 2005 on the management of copyright for online use of music, and Commission Decision of July 16, 2008 involving 24 EEA collecting societies) and urges the Commission to take further steps to try to improve this stifling situation.

The Commission report on the Online Commerce Roundtable is putting forward a number of suggestions relating to the development of legal offers of online music. Ericsson fully supports the EU and EEA wide licensing in the online environment. All market participants are to participate in this effort and industry should take the lead in the development of workable licensing solutions. Ericsson would also like to stress the importance of commercial users to have the choice of entering into licensing agreements with a number of organisations offering a single licensing solution. Additionally Ericsson underlines the need for all participants of the music and other content industries need to make a collective effort to ensure that the legal distribution of content becomes as easy as possible for all users.

Under point 4 we highlight two issues (cross border licensing and private copy exemptions) of particular importance to boosting the fledgling EU online market as well as creating a more beneficial landscape for European companies to become more competitive as global Internet players.

2 eYouGuide

On 5 May the European Commission adopted an eYouGuide which explains the rights of consumers online in an accessible and informal way and which provides them with practical advice when surfing or shopping online. The eYouGuide explains the concrete rights of European consumers surfing the web or shopping online, inline with the EU consumer protection rules.

Ericsson fully supports this Commission initiative as it will contribute to achieving increased consumer trust and confidence, which is of critical importance in tackling the bottlenecks preventing a faster take up of web services and IP technologies across Europe.

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3 Digital Agenda priorities European Commission

Viviane Reding, the Commissioner for Information Society and Media, and Meglena Kuneva, the Commissioner for Consumer Protection, announced that 8 priority areas should be addressed by the EU in the coming months and years to boost online shopping. The objectives of the two commissioners are to enhance consumer confidence in online trade and to guarantee a level playing field for online businesses. This should be achieved in their views by:

1. Allowing EU-wide licenses for online content to boost the development of online legal offers and reduce online piracy
2. Harmonizing the copyright exceptions and limitations, in particular those relating to private copying. Many uncertainties remain about what consumers can do or not with downloaded copyrighted content, as national laws on private copying vary enormously
3. Extending the principles of consumer protection rules to licensing agreements for digital content such as games and software, consumers should be guaranteed the same basic rights as when they buy physical goods
4. Providing effective civil and criminal sanctions in case of non-compliance with the EU ban on spam
5. Ensuring transparent, fair, understandable and visible privacy policies and terms of use of websites
6. Encouraging the setting-up by stakeholders of a European system of trust marks for retail websites complying with best practices
7. Enhancing consumer confidence in online payments
8. Reviewing the rules on e-accessibility to ease access to websites and online services and payments by people with disabilities

Ericsson supports the 8 priority areas set out by the European Commission for possible future policy initiatives. In particular the creation of multi-territorial licenses and the harmonization of copyright exemptions will greatly benefit pan European initiatives and offerings, as will the other EC priority measures to boost consumer trust. We would urge the European Commission to move ahead swiftly on this and initiate the specific policy measures needed to achieve a true EU internal market for these services. There is also a need to go further towards more extensive interfaces between Broadcast, Media/Music Content and ICT industry bodies. This enhanced cooperation will be necessary in order to achieve real changes.

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4 Call for policy actions

Ericsson appreciates the Commission's understanding and willingness to re-assess some policies and hereby make sure that end user satisfaction and benefits remain as key incentives driving the behavior of market players. When market conditions change as in the case of media convergence it has been acknowledged that there is a need to reassess whether sector specific policy goals are contradictory or not to market players in converging markets and if they are distorting competition or not in these markets. In addition it is important to assure that sector specific policy goals are effectively and purposefully implemented, e.g. harmonized, across sector specific regulatory regimes for converging markets.¹

EC initiatives mentioned earlier in this document offer a clear opportunity to address some key issues related to policy making in the time of media convergence. In this context Ericsson wants to focus on two priority areas identified by the initiative, namely ***cross border licensing and private copy exemption***.

4.1 Cross Border Licensing / Multi-territorial Licensing

Fair, reasonable and non-discriminatory terms and conditions for networked based media distribution vs. physical alternatives play a fundamental role in the necessary and inevitable transformation of conventional TV and Media distribution. This transformation process, supported by policy makers, needs to address illegal behaviors but even more foster the growth of multitude of competing legal alternatives. Commission's initiative can increase market players' center of attention to the latter one! The ultimate focus of the priority area should be to increase "timely availability of wide range of digital content" for technology neutral networked based distribution. Multi territory licensing practice should take into account and seek to improve current status quo in following areas:

Cross border licensing should decrease transaction costs when rights are cleared for multiple regions in one instance and in healthy competition across EU.

¹ Responding to Convergence, Different Responses of Telecommunications Regulators, report for OPTA, September 2008.

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Cross border licensing practice should increasingly take into account the fact that new technologies have advanced content protection and billing features, offering the possibility to construct payment models that are based on actual consumption at household or individual level and not on potential public reach, as in the case of conventional incumbent broadcast models.

Limit illegal arbitrage possibilities to distribute content within and across borders. Balance conventional “windowing” business logic interests with consumer interests and implications for competition at distribution level, by mandating fair, non-discriminatory and timely availability of content across all networked based distribution channels. At the same time, it should be possible to take into account media production interests and give incentives to maximize returns on investments by innovating in new business models and value propositions, e.g. the purpose and intention should not be to remove the possibility to price content at different levels and time per see.

Mandate technology neutral terms of trade for networked based media distribution; price of content should in principle reflect the value of content, actual consumption and business model related aspects (broadcast, on-demand, download to own etc) and not specifics of distribution technologies and screens e.g. written independent of transmission network, device and screen.

It is imperative to underline that Ericsson does not take a position where rights holders cannot or have been restricted to freely set prices for their products and hereby have been restricted in their commercial freedom to maximize their profits. However, it is important for policy makers to assess if and when conventional commercial rights distribution practices (including business models and business conduct) are exercised fairly and in harmony to policies in other converging sectors e.g. Telecom/Internet and TV/Broadcast as well as Competition policies.

4.2 Private Copy Exemption

Harmonization of private copy exemption across EU is an important and needed initiative and much welcomed by Ericsson. Creating EU wide set of rules will increase the transparency in the common market and will give both consumers, distributors, media and technology producers the possibility to rely on one common regime. Increasing the awareness of such a regime will be easier if stakeholders can communicate one common legal practice to all EU citizens.

Harmonization should take into account commonalities across following dimensions:

1. Different types of works and private copy exemption
2. Restrictions to copy right (other than private copy exemptions)

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3. The circle of family and close friends relevant for private copy exemptions
4. The scope of private use relevant for private copy exemptions
5. Number of copies allowed for private copying
6. Technology neutral conditions for private copy regime

Firstly, it is important to educate EU citizens on the applicability of private copy exemption for different types of work e.g. difference between computer programs vs. songs.

Secondly, it is important to educate EU citizens on other types of restrictions to copy right other than the one stipulated by the private copy exemption, and if necessary harmonize also these other types of copy right restrictions. It is important to make EU citizens aware of the fact that not all content and not all types of content use are limited by copyright. Hereby, it will also be easier to educate the public when private copy exemption is applicable and what common rules apply.

Thirdly, the circle of family and close friends within the private sphere is an area that is sensitive and has potentially severe implications for those who seek to commercially explore their rights. Ericsson's position in this context is not directly about the size of the sphere but rather the need to balance the scope of the sphere with the other dimensions e.g. a more widely defined sphere can be limited by other dimensions and vice versa.

Hence the fourth dimension is crucial and it is important to recognize a number of different types of drivers for private copy use²:

It is important to educate EU citizens on the difference between making copies for private use and the intention to make them available for further distribution outside the private sphere. In this case, it should be made very clear that purchasing content does not give automatically consumers right to redistribute it outside the private sphere.

It is important to recognize the needs and habits of digital natives and recognize situations when a legally paid for digital copy is part of a converged media communication process that is addressing the needs and habits described in case c and d below. In this case when a legally acquired content (download to own) is limited by technologies or limiting consumption by facing additional costs to shift time/place/device within the private sphere, it is creating incentives to look for alternative options including illegal ones. This initiative should strive to remove sources (both technological and commercial) that create these incentives hereby focusing to promote legal alternatives.

² A number of illustrative examples are provided to stimulate further discussion e.g. intention is not present an exhaustive description.

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Time Shift (within private sphere), to watch paid for content at a plausible point in time. Time shift features give consumer convenience to rightfully consume content and recoup otherwise lost consumption opportunities.

Device Shift (within private sphere), consumers might want to consume the very same paid for content across number of devices depending on their current situation and in this case private copy gives users the chance to rightfully consume paid for content across devices, independently of technological barriers.

Type of content, certain type of content is more suited for repeated consumption than other in the first case music is typically a type of content that can be consumed with increasing utility to scale (number of repeats). Other types of content e.g. 9 O'clock news have decreasing utility to scale and are rarely watched repeatedly; here the private copy has primarily the function of time shift.

Distribution model, when consumers sign up for "On-demand" and "Download to own" content services, private copy exemption and closely associated technological barriers to private copy (lack of widely adopted open industry standards ex DRM and CA) and commercial barriers (ex cost penalties and private copy levies) should not "Tax" consumers with additional burdens and costs. If consumers have the intention to legally acquire content for unlimited use within the private sphere, there should be no back doors that limit and restrict these consumers' intentions.

Broadcast TV and Radio services are based on distribution models where private copying can change the original intention (C-F) of rights holders when making content broadly available. Consumers can expand their consumption possibilities beyond the original intent of broadcasting that limits consumption to time and device. In this case the conventional meaning of private copying and associated levies are of relevance. However, this main stream model is under change, and as noted above, it should not be misinterpreted or misused to permit growth of new consumer habits and demands based on new technologies. Unfortunately today, this is the case in many instances and it creates uncertainties and incentives to illicit consumer behaviors. This initiative should strive to promote the industry to increase the pace towards inevitable transformation to all- interactive on-demand media distribution model as the core foundation and not as today an adjacent limited ad on service.

Regarding the fifth dimension, the number of private copies allowed is less meaningful in a digital world where a home gateway can hold one original version of the content and stream it locally in the household to a number of devices and household members. Hence, in the light of ever increasing speed of innovation the number of copies should not be limited but rather the other dimension should be considered as primary tools. A single copy can have sever implications for further distribution as in the case of peer to peer file sharing while a number of copies on disconnected or blocked devices in the private sphere might pose no or very limited risks for further distribution.

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Finally, Ericsson advocates a technology neutral private copy exemption regime where the private copy function can be realized without restrictions to technologies or architectures. The regime should be constructed independently of any physical storage media format and any solution architecture e.g. if the storage function is embedded in a consumer device or in a network. Hereby, competition between technologies is allowed and most suitable solutions will be accepted by consumers.