

European Commission - DG Competition

New consultation on the Report concerning the online distribution of music

SUBMISSION OF NOKIA

Nokia wishes to provide the following comments to the European Commission in response to your invitation for submissions in respect of the new consultation "Report concerning the online distribution of music".

Nokia is a leader in mobility, driving the transformation and growth of the converging Internet and communications industries. We make a wide range of mobile devices with services and software that enable people to experience music, navigation, video, television, imaging, games, messaging and more. Developing and growing our offering of consumer Internet services is a key area of focus. We also provide equipment, solutions and services for communications networks through Nokia Siemens Networks.

I. Specific issues in relation to the provision of copyrighted products online

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

It is critical to enable Pan-European licensing and to create new attractive possibilities for consumers to purchase and consume digital content. The achievement of this aim will support making the European Union the leading knowledge economy and online business community. Licensing reform in the European Union and EEA needs to be accelerated – we cannot allow the present uncertainty to cripple or hold back the development of a functioning digital marketplace in Europe for music and other copyrighted products. The European Commission's "CISAC decision" in July 2008 was a significant step forward towards the creation of a better functioning market, and the decision should now be affirmed in order to remove the still prevailing uncertainty. Subsequent to the Commission's decision we have made substantial breakthroughs by concluding Pan-European licensing deals for certain digital music services with numerous music publishers, their licensing agents and European societies of authors, composers and music publishers. However we need to achieve further progress by establishing a true single market within the European Union for digital content and services where rights holders represent their respective rights and works for the whole of the European Union and EEA.

An effective market-based licensing regime requires licensees to be able to negotiate appropriate remuneration for the rights with the principal rights holders who have the ability to determine the commercial terms. A so-called "one-stop shop" would not allow this and is not workable in the new agile Internet environment where new service innovations are introduced in a constant flow. Instead, a fluid and efficient licensing regime would consist of a number of market participants acting independently without any one party distorting the commercial terms through the application of monopoly leverage. Smaller catalogues could eventually be aggregated to allow for comprehensive licensing of musical works from a manageable number of licensees. Impartial tribunals are needed to resolve any market failures and to prevent abuse by licensors.

While we believe the vertical fragmentation of rights to avoid monopolies or monopolistic behaviour in licensing is critical in allowing a functional market to develop, we are concerned about the possible horizontal fragmentation of the market, i.e. that the rights to the same copyright are controlled by multiple parties. An example of such horizontal fragmentation is the possibility of the reproduction and communication rights being licensed by different entities. Such a development could create copyright gridlock which could severely hamper Europe's ability to be a leading information society. We have so far been successful in preventing the concern over horizontal fragmentation of rights for musical works to manifest itself with the cooperation of the music publishing industry and the collecting societies. However, there continues to be a risk that the separate holders of the reproduction right and the communication right in a particular musical work would not agree on a licensing structure, which could significantly complicate the nascent evolution of Pan-European licensing regime, and reverse the substantial gains made during the past 12 months. We see no justification for the split of the copyright of a musical work contained in a download into two separate pieces.

Likewise, it is important to accelerate development of a single digital market in the European Union for audiovisual works, including films, television productions, music videos and podcasts. Licensing of audiovisual works can be highly complicated and burdensome, as the number of rights holders with rights requiring licenses in audiovisual works can vary considerably by work and most likely cannot be identified by the licensee. Similarly, operational duties relating to audiovisual works can be complex and costly. We consider it vital to simplify the rights regime for audiovisual works and avoid digital gridlock in audiovisual licensing in order to continue the digital evolution of goods and services in the Europe Union.

For the purposes of nurturing new digital services and business and legal clarity, it is important that the entities granting licenses to service providers affirm and ensure that their licenses authorise all uses permitted by the digital services they license. Careful attention is needed in connection with the contentious issue of private copy levies which could have an impact upon digital licensing, as explained below, and which are now rapidly spreading to more and more digital products with attempts to apply unjustifiably high tariffs, including in cases where arguably no private copy levies should be applied. Nokia believes that private copy levies, introduced as a crude remuneration model in the analogue era, are neither appropriate nor fair in the digital world. In particular, we believe private copy levies should never be contemplated as, or be allowed to develop into, a primary or significant revenue source for digital content, as this would *discourage and cause considerable negative impact to legitimate and innovative digital distribution models in Europe as well as disincentivise commercial licensing activities*, at a time when – despite significant digital piracy – many service providers are making substantial investments in developing and launching new digital offerings.

A regime in which service providers could legitimately license only one reproduction (the first download) of a file for consumer consumption (on the basis that all secondary copies would be excluded – i.e. unlicensed - as private copies) within a service where a service provider seeks to offer more extensive usage rights to consumers and where other rights holders are willing to license the entirety of such usage rights would seriously detract from the whole consumer value proposition in the digital content service area. This position is known to be held and promoted by some collecting societies in order to maximise the revenue opportunities from private copy levies. In such a scenario, consumers would pay a levy repeatedly -- potentially without limitation -- for the same digital content on their different digital devices (platforms) and blank media, on top of the license fee. Furthermore, private copy levies should not be contemplated as a compensation mechanism for piracy as this would blur the distinction between legal and illegal downloads and have the unfortunate consequence of encouraging - even legitimising - illicit copying (piracy), whilst discouraging service providers' extensive investments in legal and authorised consumer offerings.

A well-functioning, commercially-based Pan-European licensing regime is **critical to the promotion of cultural diversity in Europe**. Authors of creative works should be able to choose by whom their works

are licensed and the platforms on which they are distributed. The European Commission's CISAC decision was, again, an important development by confirming the author's right to join any collecting society, and not only the society located in a given territory. A further step is needed, however, to allow authors full domain of their intellectual property and the right of contract for it with any party they may deem in their best interest. The development of digital distribution, through devices such as mobile phones and from the music services such as the Nokia Music Store and Comes With Music, has made available a much greater range of professional and amateur work, in a wide range of styles and languages, in a way that old models of distribution could not. It is important to separate these developments from the important work of subsidising cultural diversity and grass-roots funding of local cultural initiatives. We support this important work; however it is important that objectives relating to such social programs are done without burdening the copyright licensing regime, which needs to be commercially driven and market-based.

II. Specific issues on pan European Internet services

The offering of pan European Internet services should be facilitated and encouraged by ensuring legal certainty and by limiting the legal requirements applicable to such services. Nokia believes that regulatory and legislative policy should be focused on removing existing regulatory obstacles, clarifying the existing rules regarding the provision and distribution of goods and services online and avoiding new legislation which could potentially introduce additional barriers and decrease legal clarity. A vibrant and innovative digital content industry depends on every player in the value chain displaying a flexible approach to business models and licensing arrangements; this is critical to allow players to innovate. We encourage the Commission to consider potential bottlenecks to innovation which hamper the use of new and productive technology to meet consumer demand as preventing the implementation of possible alternatives to digital piracy. The ongoing discussion relating to intermediary liability is an example of an area where more clarity is needed and where the existing provisions regarding liability of intermediaries should be preserved (instead of various local interpretations of such provisions).

The Internet, and access to it, is not tied to a particular country and the Internet is often made available to users embedded in or marketed in association with locally offered and distributed hardware products. Therefore the European Commission could enable and encourage service providers to offer Pan-European Internet services by establishing legal certainty that service providers and the services offered by them to the public are not bound by or subject to the terms and requirements of each local regulation in each Member State, even if such service reaches users in connection with a hardware product delivered locally. As the Internet is global and many companies offer, or seek to offer, global services from within and without the European Union to the European public, companies should not be required to create localised versions of each service (e.g. in local language) in order to make available such service through the Internet, whether delivered through a locally delivered hardware product or otherwise. A requirement to comply with 27 sets of national laws and regulations would hinder both the creation of a dynamic information economy in the European Union and the rollout of new services and goods accessible via a global Internet to the public in all of the European Union's Member States.

Summary

Rights holders, industry and government should have a mutual interest in creating a dynamic and successful digital market for copyrighted works, including music and audiovisual works, in the European Union and EEA. By implementing a commercial market-based licensing regime which fully licenses all uses permitted by service offerings on a Pan-European basis and by clarifying that companies shall not be required to create localised versions of each service (e.g. in local language) in order to make available such service through the Internet, whether delivered through a locally delivered hardware product or otherwise, the development of a leading and thriving digital market in the European Union can be accelerated and made a reality.

We thank you for the opportunity to submit our comments to you.