



“GREEN PAPER ON THE ONLINE DISTRIBUTION OF AUDIOVISUAL WORK IN THE EUROPEAN UNION: OPPORTUNITIES AND CHALLENGES TOWARDS A DIGITAL SINGLE ACT”

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Introduction

EuroISPA welcomes the Commission’s Green Paper on Audiovisual Work in the European Union and stresses the need to achieve a true digital single market allowing for new and innovative distribution of content online for the benefit of consumers. In order to prevent further barriers to the development of the digital single market, EuroISPA urges the Commission to address the use of restrictive commercial practices which constitute an obstacle for the access of content online. In addition and, in light of any regulatory review, we call on the Commission to take due account of new technologies that enable new ways of providing new services, which fit consumers’ needs.

1. WHAT ARE THE MAIN LEGAL AND OTHER OBSTACLES – COPYRIGHT OR OTHERWISE - THAT IMPEDE THE DEVELOPMENT OF THE DIGITAL SINGLE MARKET FOR THE CROSS-BORDER DISTRIBUTION OF AUDIOVISUAL WORKS? WHICH FRAMEWORK CONDITIONS SHOULD BE ADAPTED OR BE PUT IN PLACE TO STIMULATE A DYNAMIC DIGITAL SINGLE MARKET FOR AUDIOVISUAL CONTENT AND TO FACILITATE MULTI-TERRITORIAL LICENSING? WHAT SHOULD BE THE KEY PRIORITIES?

ACCESS TO THE CONTENT AND ARTIFICIAL FRAGMENTATION OF THE EUROPEAN DIGITAL MARKET

EuroISPA recognises the presence, within the European Union, of pre-existing barriers preventing or discouraging cross-borders services. The major obstacles preventing the creation of a digital single market derive from national copyright legislations, different administration and management of rights systems, different cultures and languages, as well as the commercial practices put in place by traditional rights-holders (studios, broadcasters, collecting societies) in relation to licensing of content rights. In particular, the latter practices limit the quantity of premium content available for the Internet and/or impose commercial conditions (price, territorial and platform exploitation, timing, etc.) which substantially hamper the possibility for the purchaser to create digital content in a competitive and innovative way. Such restrictive commercial practices underpin consolidated and old-fashioned business models developed in the pre-Internet era, and are completely inconsistent with the reality of the digital economy. As such, they constitute a serious obstacle for the achievement of the objectives of the European Digital Agenda.

THE ROLE AND THE IMPACT OF COLLECTING SOCIETIES

The impact of the collective right management system on the digital single market should also be considered. While issues relating to access to sources of content

prevent the emergence of a digital market, the fragmented collecting society system creates additional complexities. Under the current system, most audiovisual content that could easily be distributed through an online platform for the entire continent's consumption may be subjected to several deals and to clearance 27 times through 27 different collecting societies. All such deals involve transaction costs and potential restrictions which dramatically hamper the roll-out of cross-border services. This is a real frustrating situation for innovative and competitive players, like EuroISPA's members, which, in the absence of the above obstacles, could easily develop online content offers with unlimited reach, thanks to the capability of the Internet protocol and the wide presence of broadband and high-speed connections.

THE KEY PRIORITIES

The European Commission needs to intervene upon the major elements which have an impact on the development of digital content and, as a result, impede the development of the digital single market for the cross-border distribution of audiovisual works:

- (i) **availability of content** (essential to build complete catalogues, including current titles, to effectively respond to demand): the Commission should explore the impact of exclusivity clauses, particularly their potential discriminatory effect on emerging platforms;
- (ii) **time to market** (to make content available when the demand and willingness to pay are higher): the current windowing system is obsolete and seriously damaging the objective of the Digital Agenda, because it hampers the circulation of digital works and discriminate amongst platforms, to the detriment of more innovative technologies and business models;
- (iii) **flexibility in the business models for the development, distribution and the refunding of digital content:** for the development of the digital single market it is necessary to push present boundaries, diversify, break new ground and allow for all possibilities. The Commission should explore the effect of restrictions in commercial licensing (including pricing structures) that impede the development of new types of services and so ensure online services merely replicate existing business models;
- (iv) **scale** (the capability to build pan-European offers exploiting the economies of scale made possible by the Internal Market): a reform of the collective society system, including at least the possibility for digital content providers to clear all needed rights with a single collective society for all the EU (one-stop-shop);
- (v) **lack of incentives online compared to offline:** the elimination of unfavorable treatments between online and offline services/products needs to be carefully considered by the Commission in order to incentivise the e-commerce and introduce an element of competitiveness versus the traditional and more established distribution platforms.

Where the Commission finds that commercial practices, market structures and/or legal measures create a negative impact in these key priority areas that impede the Digital Agenda, it should develop appropriate legislative and non-legislative interventions to correct market failure.

4. WHAT TECHNOLOGICAL MEANS, FOR EXAMPLE INDIVIDUAL ACCESS CODES, COULD BE ENVISAGED TO ENABLE CONSUMERS TO ACCESS "THEIR" BROADCAST OR OTHER SERVICES AND "THEIR" CONTENT, IRRESPECTIVE OF THEIR LOCATION? WHAT IMPACT MIGHT SUCH APPROACHES HAVE ON LICENSING MODELS?

It is worth-noting that this issue was recently addressed by the ECJ in a case regarding soccer broadcasting.¹ The European court has ruled that, while territorial limitations remain lawful in principle, they cannot be enforced beyond what is necessary to the legitimate interests at stake, *"namely to ensure appropriate remuneration for the holders of the rights concerned"*. The case at stake concerned a national legislation (UK) prohibiting the import, sale or use of foreign decoder cards lawfully acquired and used in another Member State (Greece). Such restriction was found contrary to the freedom to provide services and, according to the ECJ, *"it cannot be justified either in light of the objective of protecting intellectual property rights or by the objective of encouraging the public to attend football stadiums"*.

EuroISPA considers that the Commission should assess, in the light of the EU Treaty freedoms, the compliance of a national legislation empowering rights-holders to impose to digital providers the use of technological measures preventing European subscribers to use digital services lawfully purchased in another Member State. If artificial barriers exist that can prevent the circulation of digital services country by country, then necessary measures should be explored to address them.

7. ARE SPECIFIC MEASURES NEEDED IN LIGHT OF THE FAST DEVELOPMENT OF SOCIAL NETWORKING AND SOCIAL MEDIA SITES WHICH RELY ON THE CREATION AND UPLOAD OF ONLINE CONTENT BY END-USERS (BLOGS, PODCASTS, POSTS, WIKIS, MASH-UPS, FILE AND VIDEO SHARING)?

The copyright regime should evolve in order to ensure legal certainty and clear recognition for the new creative content in the digital world. Such an evolution is necessary in order to boost the development of the digital market in its whole, since the contribution of consumers and user-generated content for the success of the European Digital Agenda is essential.

While it is important to protect creative works from plagiarism or unfair exploitation, it should be also possible for creators of digital content to draw upon our common cultural heritage when creating new artistic works, without fear that by doing so they may be infringing copyright or related rights. The Commission should investigate whether existing intellectual property protections unduly restrict the artistic creativity, critical comment and other expressive works, and examine the need for new exceptions or other measures to correct this.

EuroISPA is aware of the complexity of such a process, particularly when it comes to establishing the right balance between the different interests in a way to promote the incentive in investing in content without damaging innovation and opportunities for new entrants. It is possible, however, that legal uncertainties about legitimate usage of

¹ Judgment of October 4, 2001, in cases C-403/08 and C-429/08, Football Association Premier League and Others v QC Leisure and Others Karen Murphy v Media Protection Services Ltd.

given rights will remain, with related conflicts and disputes. In this context, it is of paramount importance to confirm and possibly reinforce the current ISP liability regime, as laid down by Directive 2000/31/EC (so-called Electronic Commerce Directive), according to which hosting and access providers are exempted from liability for illicit content stored or transmitted under specific conditions (articles 12-14 of the Directive). Such principles become more and more important in the perspective of a digital single market, where the flourishing of new offers may potentially increase legal uncertainties and conflicts amongst creators, content providers and rights-holders.

8. HOW WILL FURTHER TECHNOLOGICAL DEVELOPMENTS (E.G. CLOUD COMPUTING) IMPACT UPON THE DISTRIBUTION OF AUDIOVISUAL CONTENT, INCLUDING THE DELIVERY OF CONTENT TO MULTIPLE DEVICES AND CUSTOMERS' ABILITY TO ACCESS CONTENT REGARDLESS OF THEIR LOCATION?

Technological development has much to offer to reflect and satisfy the need of consumers and businesses in terms of mobility, differentiation of usage and quality of service.

The Commission should make sure that old-fashioned copyright schemes will not frustrate such technological developments. In an era in which remote recording and storage is progressively becoming a new paradigm to store personal content and information, and is widely recognized as an essential factor in stimulating demand for broadband and ultra-broadband, many Member States implement Article 5.2 of the Copyright Directive 2001/29/EC - allowing users to make private copy for personal use of copyrighted audiovisual content broadcasted or distributed through cable - as permitting users to make copies through traditional devices (PVR, video recorders) but not through technologies for remote recording and storage. Despite the Directive being technologically neutral, this narrow and old fashioned interpretation of the copyright regime is incompatible with developing Internet based businesses and denies users the right to make their "private copy" of content using new technologies such as remote recording systems (NPVR).

In order to guarantee the development of new technologies in the EU, the Commission should further clarify the need for an interpretation of the Copyright Directive provisions allowing for the development of new services that can in turn increase the demand for broadband and ultra-broadband connectivity.

EuroISPA is the world's largest association of Internet Services Providers (ISPs) representing the interests of more than 1800 ISPs across the EU and the EFTA countries. 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 (www.euroispa.org). Contact: Andrea D'Incecco, Head of Policy (+32 2 503.22.65/andrea@euroispa.org).