

March 12, 2008

**MINISTRY OF EDUCATION AND CULTURE  
FINLAND**

*Comments on the*

**Communication from the Commission to the European Parliament, the Council, the  
European Economic and Social Committee and the Committee of Regions**

**on Creative Content Online in the Single Market**

**General**

Finland welcomes the European Commission's efforts to develop a policy to promote creative content online, and seizes with pleasure the opportunity to offer its response on a number of items.

Since its adherence to the European Community, Finland has stressed the importance of a policy, and joint measures, to enhance the production and distribution of European digital cultural content, as well as the need to provide favourable conditions for the development of a market in the digital network environment.

The Ministry of Education and Culture organised a national hearing and a round of written submission on the Communication. A number of stakeholder organisations and branch associations expressed their active interest in the initiative of the Commission, and some of them have submitted their own views to the Commission.

Our first general observation is that the Communication focuses strongly on copyrights. The rights and licensing issues are undeniably very important for the development of a market in the digital network environment. The economy of the creative content is to a large extent based on rights, and also in a crucial way based on market demand.

The trade of digital intangible content is, in fact, trade in rights.

However, there are also other relevant policy areas that should be considered more seriously already at the outset when additional European measures are formulated. Most important of these might be the audiovisual policy and the question whether existing positive, supportive measures are enough. Specially designed new financial incentives could be among the most efficient measures to help SMEs to enter the digital distribution market, to strengthen the competitiveness of the European industries, and to accelerate the development of the European online market.

Our second general observation is that the Communication concentrates mainly on music and audiovisual content. This rather narrow focus was commented constructively in the submissions of the Finnish stakeholder organisations. There are

also other areas of online content, *e.g.* online publishing, which are equally important. Attention should be paid to specificities and different business models of different cultural content. What is stated about business practices and market structures in the field of music, collective rights management, and audiovisual content, do not necessarily fit to other content areas. *E.g.* in the field of online publishing the prevailing business model is based on individual licensing.

Our third general observation is, that customer demand always plays an important role in the market as successful market innovations necessarily are demand driven.

## Objectives

Finland endorses the main aim of the Communication, support to the development of creative content online markets in Europe.

The main reason for this position is the recognition of a digital future where all content flows in immaterial form. In such a place all content business models that are based on distribution of tangible objects may totally have disappeared.

If the technology industry, telecommunications industry, internet service providers front, the content industries, and the governments would not be able to establish a safe environment for economic activities in information networks, it would be wrong to advice the content industry to go (more) online.

The functioning basis for economic activities is laid on customer demand and legal rules that support different business models.

Secondly, it is indispensable that the detrimental effects of illegal activities in the information networks will be minimized. This requires common willingness and cooperation of all the parties having a stake in the infrastructure and the economic activities within and around it.

This is a question of the economy of culture – whether there is creative economy or not – in the full digital era.

When the promotion of content online market includes direct or indirect public financial support measures, it goes without saying that the measures shall not be discriminatory, nor lead to market distortion, and they have to pass the criteria for acceptable state aid.

Furthermore, in this context it is important to pay attention to several other dimensions and points of attachment of the policy now being established. Among these are the possibilities and the potential of small operators. Another aspect is to recognize the importance of cultural diversity, and the position of small Member States and smaller language markets.

Finally, even if the policy is based on the overall objective to establish a pan-European content online space with its multi-territory licensing structures, the content economy should pay attention to the overall economic interests of the Member States.

The Member States are the place where the content is created, where the industry is located, where the consumers are, and where the employment takes place.

## **Considerations on questions in the Annex to the Communication**

### Digital Rights Management

It is important that rightholders have a possibility to exploit DRM technologies against non-authorized and unlawful use of protected subject matter. Equally important is that technology should not hinder the lawful use of digital content products. DRM systems should allow copying for personal use and the use of lawfully acquired material in different devices.

The customer reaction against use of DRM technologies indicates a lack of understanding of consumers' demands. There is almost full consensus that the DRM systems should be interoperable.

The use or non-use of DRMs is a matter of rightholders and those who disseminate online content. The interoperability of different DRMs and devices is a question for the DRM developers and device producers, as well as for those – content owners and disseminators – who set their functionality requirements.

If the Member States and a vast majority of market operators, as well as consumers, want interoperability of DRMs, the first step should be to define the desired level of interoperability, be it complete or partial. Next, there is the choice whether to leave it completely to the market operators, or to interfere. If the choice is to interfere, there are two possibilities: to recommend something to market operators or to impose an obligation to do it. To make DRM technologies interoperable in the market in a foreseeable time, in a harmonised way within the European Community, would require legislation, *i.e.* a directive or other legislative measure on the minimum requirements of DRM interoperability.

It is absolutely clear that consumers should be provided with information on the functioning, interoperability, and possible use restrictions in the connection of online offers of digital creative content.

### Multi-territory rights licensing

The rightholders / producers / industry in different fields of online content are able, if they want, to organise the licensing of the online making available of their protected subject matter on a national, regional, multi-territory or global scale.

If it would be in their direct economic interest, they would have already done so. No government action would have been needed for that.

This means that there must be some other reasons why the content industry is not yet 100 per cent online.

What probably matters for the industry, is whether there is a market place where to go, whether there are business prospects, and whether there is a possibility to set a price for the products.

In all these respects it is up to the content producers and creators to think whether to launch, and what kind of, business online. This means the right, and the faculty to optimise one's own market exploitation (also in the territorial sense).

Going to, or staying away from, the online market, is a business decision of the content industries. This has also to be respected.

In the present situation governments – and the Commission – should listen to signals from both the content industry and the intermediaries wanting to operate on larger territorial scales.

#### A recommendation on multi-territory licensing?

In its Communication, the Commission is considering the content online policy area with a view to proceeding to a proposal for a Recommendation of the Parliament and the Council.

In this case, as in some previous cases, there is no information or transparent analysis on what grounds the choice of the suggested measure has taken place. The suggested measure in this case is a Recommendation within the framework of the European Community. Other possible more effective legal measures available, or combinations of them, have not been assessed.

In order to achieve the best and most functioning measure to promote the European content online, the Commission should assess different legal measures, including the possibility to propose a directive or a regulation on the licensing issues.

A Recommendation concerning the territorial extent of licensing would have an informative value on what the European institutions would like to see to happen. Such expectations, valued against the direct interests of the business operators, would have no effect. There would be no real timetable, no harmonisation concerning important aspects, no guarantees for a Community-wide action, no legal certainty.

The only means to achieve quicker and more harmonised results, and legal certainty concerning regional or multi-territory licensing would be a proper more effective measure.

When considering this, a most relevant question is, whether a pan-European or other kind of larger scale licensing is a prevailing societal interest in the European Community, that supersedes and shall be valued over other intrinsic interests within these business areas. These other interests take into account the possibly falling price-levels, the possibility of exploiting markets on the merits of the principle of territoriality of rights etc.

None of the foregoing is however meant to question the importance of the four-freedoms framework of the European economic system.

The nearest alternatives to a Recommendation would be a Directive to harmonise the effect of multi-territorial licensing and/or to provide provisions on the mutual recognition of the licensing agreements, or a Regulation that would bring an immediate effect within the whole European Community to licenses / licensing agreements which fulfil the necessary conditions and criteria.

Neither of these solutions would violate the principle of territoriality that prevails in the field of copyright under the system of international conventions. They would simply, using different methods, accord certain licences a pan-European or other desired larger territorial effect. A very important question is, if such solutions would be considered, what role the principle of country of origin should play. The other most important question is, what would be the destiny of the existing contractual solutions and structures in the field (*i.e.* the question of the application in time etc.).

This model would provide to the market operators an option to take advantage of the community-wide market.

Finally, the governments and the Community, should restrain themselves from intervening and advising in business models.

The task of the public powers should be the creation of framework for different kinds of business models.

And most importantly, legislation should not constitute obstacles for larger operating scales, and different business models.

### Legal offers and piracy

Without drastically diminishing unlawful making available of cultural content online, the lawful offering of content faces difficulties, due to high risks of investment evaporating and valuable content evading from the hands of creators and producers, and the perverse competitive edge of unlawful content free of charge.

**The MoU in France.** The French initiative is interesting, and is monitored in detail also in Finland. The whole matter of “warning and suspending” is a complex idea, and both technically and legally challenging. The most significant aspect in the French initiative is the fact that all those stakeholders who have direct interest, and who also have possibility to contribute to the application of the mechanism, are involved in the project. It is unthinkable that such a mechanism could be developed without willingness and direct involvement of *i.a.* ISPs.

For this kind of a measure a legal basis in the legislation is necessary. Such a project is delicate both politically and in principle. Interfering in communications connections of citizens cannot be done on light grounds. The private infringers are using their connections also for their civil tasks like e-mail correspondence and bank matters. The

question is also about the development of information society, and possibly about large groups citizens and households.

**Filtering.** Blocking access and filtering could – technically – be effective measures to prevent unlawful dissemination of content. This is, however, subject to the reliability and preciseness of their functioning, which are evolving factors. The systems should not block lawful communication. And, in the same way as suspending or cutting internet connections, filtering would mean interfering or manipulating telecommunications connections which necessarily would be subject to monitoring and analysing the flowing content. The regime of telecommunications legislation, including provisions on telecommunications secrecy, and when applicable, legislation on the protection of personal data do not, without carefully crafted provisions/exceptions, allow such operations. Hence, clear provisions in legislation are needed if filtering would be introduced as a measure.

## **Conclusion of the Communication**

**Content online platform.** Finland endorses the plan by the Commission to establish a stakeholder platform for discussion at European level.

Involvement of Member State representatives to the work, and meeting activities, at some instances, would probably bring added value to the process, and as such function as a means of soft (“open”) coordination of the policy development in the Member States.

**Proposal for a Recommendation.** A Recommendation might function as a tool to reach the objectives of the Communication. However, it is not necessarily the most efficient method to achieve results in short term, nor does it guarantee adequate, effective and uniform implementation in the Member States.

The positive side of a Recommendation by the European Parliament and the Council is that the process guarantees a level of commitment by the Member States and reinforces the measure. In fact, by adopting a Recommendation by the two Community institutions, the political problems involved in a mere Commission Recommendation might be avoided.

The final position of Finland concerning the nature of the instrument depends of course on the content of the Recommendation.

Self-evidently, and regardless of the instrument and its legal nature, markets will continue to develop on the basis of customer demand.