

Dutch Position Paper

Consultation by the European Commission on the Communication on Creative Content Online in the Single Market (COM(2007), 836 final)

This position paper contains the Netherlands' response to the Commission's Communication 'Creative Content Online in the Single Market' (COM(2007), 836 final), particularly the issues of multi-territory rights licensing and Digital Rights Management and piracy. The position paper also briefly discusses the consequences that different private copying remuneration schemes will have for the subject of the Communication.

The Communication gives a clear picture of the main challenges facing the dynamic and cross-border market for online content. The Netherlands welcomes the Communication and agrees with the Commission's choice of objectives and challenges with regard to creative online content. We support an approach that takes advantage of economies of scale while taking into account possible economic and cultural consequences for the parties concerned and for society in general.

The Commission has formulated its ideas for a Recommendation so broadly that the Netherlands will have to wait for the final product before we can judge it on the basis of the subsidiarity and proportionality principles. As we are dealing here with a dynamic and cross-border market, however, the Netherlands acknowledges in principle the added value of a European approach.

In general, the Netherlands is against imposing an unnecessary regulatory burden on businesses when taking follow-up measures in this area. A thorough impact assessment and a fully fledged cost-benefit analysis are also desirable.

Furthermore, the Communication caused the Netherlands to make the following comments.

1. Multi-territory Rights Licensing

Increasing convergence, of markets and services, internationalisation and new internet-based services and business models demand creative thinking about new forms of rights management. The Commission correctly observes that the current fragmentation of the market for copyright management makes it difficult to fully benefit from the internal market's potential.

The Commission should, however, produce an impact assessment addressing further the possible benefits and risks of the approach it advocates. With regard to music rights, the Netherlands is concerned about the risk that the Commission's model could lead music publishers to use the services of only a small group of large collective management societies to manage their rights. This would expose smaller national organisations in the EU to the risk of shrinking rights portfolios. Less popular composers, lyricists, musicians and smaller publishing houses in the medium-sized and small Member States could also face declining revenues due to their inability to secure representation by a collective management society at prices they can afford. There is a risk that the online supply of cultural content and thus the degree of cultural diversity online will, contrary to the wishes of the Commission, the Member States and the European Parliament, shrink rather than grow.

The impact assessment must therefore carefully examine different ways of combining fair competition on the market for rights management with the preservation and encouragement of cultural diversity in Europe. The competition between collective management societies must be advantageous not only for rightholders but also for consumers (users). One way to ensure that this is the case would be to continue to allow composers, lyricists, musicians and music publishers to entrust the rights to their work, online and otherwise, to an organisation in each single country or language area. Users of the copyrights would need to have free choice of sources and should be able to obtain and pay for licences for the entire global repertory from a single organisation. Finally, there should be competition on the basis of administrative costs and service provision, so that rightholders could use the collective management society that offers them the best service and the highest

payment and/or the one where users could get an inexpensive licence for use of the music.

Measures like these would provide incentives for more user-friendly rights management. They could lead to better service at a lower cost for rightholders while giving users access to the entire global repertory from a single source. At the same time collective management societies could continue to promote cultural identities, thus safeguarding Europe's unique cultural diversity. The best guarantee for cultural diversity and creativity and for the greatest possible supply of online content would be a binding instrument like a directive. Only a directive can create the necessary level playing field.

Conclusion

Liberalisation of the European market for collective management of rights to online content is advisable. A directive should guarantee a culturally diverse range of online content in Europe.

2. Private Copying Remuneration Schemes

In this connection, the Netherlands would like to raise an issue that is not discussed in the Communication but is in our opinion essential to ensuring a plentiful supply of online content. This is the Netherlands' desire for a directive harmonising the different national systems for private copying. The lack of any harmonisation in this regard distorts competition and hinders innovation, thereby affecting the Communication's core objective. The Netherlands is pleased to learn of the Commission's first, cautious initiative to launch a consultation on private copying levies. Private copying is also important in connection with the present Communication, which is why the Netherlands seeks to draw the Commission's attention to it. There are major discrepancies between most Member States' private copying remuneration schemes. As a consequence of these discrepancies, rightholders are being compensated differently in different parts of the European Union, and collective management societies face the risk of competition from imports from other Member States that

circumvent the levies introduced under their domestic schemes. As the Commission's consultation on the levy systems clearly pointed out in 2004, levies in the European Union are not applied equally, whether with regard to equipment, media or the amounts charged. This distorts the internal market and adversely affects innovation, since, in the absence of a level playing field, the technology and consumer electronics manufacturing industries will find it difficult to pass the levies on to consumers. As a consequence, innovative products are not making it on to the European market in time, if at all, so that Europe is lagging behind the US and Asia. This will also affect the content industry, which makes this subject of the utmost importance for the Commission's present Communication.

Moreover, the Copyright Directive itself creates an ambiguous legal regime. Member States that allow private copying are obliged to introduce and maintain some kind of compensation scheme. In doing so, account should be taken of the availability (Preamble, paragraph 39) or application (Article 5(2)(b)) of technological protection measures and the differences between digital and analogue private copying (Preamble, paragraph 38). In addition, possible harm to rightholders should be taken into account (Preamble, paragraph 35). However, the Directive does not indicate, let alone specify, how these criteria should be taken into account. In the Netherlands, this has created uncertainty about the requirements imposed by Community law on the scope and operation of the national levy scheme. This could ultimately affect the legitimacy of national levies.

Conclusion

The lack of a harmonised system of remuneration for private copying can both distort competition and hinder innovation, thus constituting an obstacle to an EU-wide market for online content. Harmonisation of private copying legislation should therefore be pursued vigorously.

3. Digital Rights Management and Piracy

There is a violation of copyright (or related rights) when a work is reproduced or made available to the public without permission of the copyright holder. Large-scale or organised copyright violation is piracy. Enforcement of copyright is an ongoing concern of both rightholders and the authorities.

While piracy can be an obstacle to innovation, technical innovations can help combat piracy. This can be done by applying the technical protection measures of the Digital Rights Management (DRM) system, such as safeguards against copying DVDs and CDs or restrictions on burning music CDs imposed by online suppliers. As the Commission rightly states, much work remains to be done in order to ensure the interoperability, transparency and user-friendliness of this technology. The Commission should especially play an active role in promoting transparency.

Experience shows, however, that DRM does not provide total protection against piracy. DRM systems are regularly compromised by hackers so that copyrighted work can still be copied repeatedly without permission. There are also often economic or cultural reasons for not using DRM.

The Netherlands is interested in the other possible ways of combating piracy mentioned by the Commission: a greater supply of legal content, public information campaigns, enforcement and cooperation with internet service providers.

Conclusion

DRM technology can play a major role in fair rights management, thus promoting the emergence of new, innovative business models. However, its transparency, user-friendliness and interoperability still leave much to be desired. In the interests of consumers, the Commission should play an active role in promoting transparency.