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Ericsson Position

Ericsson comments on European Commission DG INFSO and DG MARKT reflection document on 'Creative Content in a European Digital Single Market: Challenges for the Future'

1. Background

On 22 October, 2009 the European Commission, DG Information Society and DG Internal Market published a reflection document on 'Creative Content in a European Digital Single Market: Challenges for the Future'. As all stakeholders have the possibility to comment to this paper, Ericsson would like to take this valuable opportunity to provide its full support for the underlying objectives of this document and the necessary steps ahead to be taken by the European Commission and the member states. Ericsson also urges the new Commission, and especially Commissioner Kroes to take on the issues of the European Digital Single market as a priority.

As the leading global provider of telecom infrastructure, including IPTV and Mobile TV, Ericsson would like to stress the importance of innovation and the fundamental change and their immediate implications for copyright and equally important commercialization of creative works for the European economy and citizens. Our comments focus on how to best achieve a real single digital market for Europe with a holistic perspective on the entire ecosystem including all parties.

Ericsson acknowledges the Commission's earlier initial steps taken over the last few years on the management of copyright for online use of music, on collecting societies and competitiveness, territoriality of copyright and private copy exemption. Ericsson appreciates the Commission's understanding and willingness to continue to take further steps to remove remaining obstacles to a better functioning pan-European digital market.

Ericsson also fully acknowledges creative industries' need for appropriate compensation. Persistent and far-reaching file sharing of digital content is threatening to crowd out conventional business models harming the rights holders and related sectors, the service and equipment providers and eventually the consumers. At the same time, the emergence of attractive legal digital content market offerings has been slow and inadequate. So far, the absence of an adequate update of copyright to digital realities is according to Ericsson a key reason for the slow and inadequate market response.

2. Copyright has been a closed negotiation process among insiders resulting in special interest legislation

Ever since the enactment of statute of Anne, the first copyright law in the world, by the British Parliament in 1710 to currently ongoing ACTA negotiations, evolution of copyright law has been a closed negotiation process of privileged insiders resulting in special interest legislation. This process has under every revision created or attempted to create substantial entry barriers to outsiders e.g. to new start-up industries. Outsiders have changed over time such as: photography, talking machines (aka phonogram), motion picture, and later the advent of broadcast radio and TV ; terrestrial, cable and satellite. These innovations share at least one common history – they have all been perceived as threats to incumbent creative industries disrupting status quo copyright privileges.¹

One should also remember that “old” outsiders have always fought “new” outsiders, e.g. music companies fought the introduction of radio, and the motion picture industry fought the introduction of VCR, terrestrial TV broadcast fought the introduction of cable broadcast. One way of understanding the constant repetition of history, is in the light of the closed nature of the special interest seeking legislative process of copyright.

And here we are again, a historical ‘dépà-vu’ is once again in progress of repeating itself. This time the copyright is challenged by the rapidly expanding digital age. Once again, new technology innovations are dividing industries between insiders, protecting the status quo by extending their existing privileges to new technological innovations and interactive platforms, and the outsiders, the new entrants, who, like the innovators before, are pushing profoundly and rapidly ‘game-changing’ technology and are questioning the assumptions on which existing copyright laws are based. New entrants are asking to be able to play a role in addressing the privileges of copyright law and how these copyright rules affect them.

3. Creativity is not threatened by the digital age

Has professional creativity suffered in the digital age? The sales of CD albums have generally fallen but this is not a measure of creativity but rather a better proxy is the number of albums created, which has exploded:

- 35 516 albums were created in 2000, in 2007 that was 79 695 (including 25159 digital albums).²

¹ Digital Copyright, Professor Jessica Litman, 2006, Prometheus Books.

² Nielsen SoundScan 2008

Other measures of professional creativity show the same result e.g. creativity is not negatively affected in the digital age:

- Publication of new books rose by 66% over the 2002-2007 period
- Since 2000, release of new albums have more than doubled
- World wide feature film production is up by more than 30% since 2003³

4. Professional creativity is not in a financial distress in the digital age – but has its challenges!

Whether aggregate revenues for creative industry such as music have declined is a different question from if CD album sales are a good proxy for aggregate industry revenues. A decline in the latter is driven by number of factors:

- Replacement sales of LP records have tailed off resulting in decline in demand for CD albums
- Competing digital formats such as: broadcast TV music (Idol, MTV) Mobile music, Streaming (Spotify), Download (iTunes) are replacing CD album sales
- Demand for music is moving to live performance
- File sharing is displacing physical CD album sales. In the latter case empirical academic research shows mixed results, two studies show positive effect and majority show negative effect a rate of 20%⁴

The leading explanation for CD album sales decline is the end of the transition from LP to CD aka selling the same album once again on a new medium.⁵ One should also recognize that aggregate music industry revenues, e.g. physical, digital sales, live music, licensing, and levies are not declining but are stable or are even growing.⁶

Other creative industries such as radio, TV, film entertainment, and video games have been growing in Europe⁷ and globally⁸ during the period between 2004 and 2008. A number of these industries are expected to continue to grow.⁹

³ 3807 in 2003 and 4980 2007 Screen Digest 2004 and 2008

⁴ Harvard Business Review File-Sharing and Copyright, Felix Oberholzer-Gee and Koleman Strumpf, May 15 2009.

⁵ Ibid.

⁶ Swedish Royal Institute of Technology, Daniel Johansson and Markus Larsson, The Swedish Music Industry in Graphs, Economic Development Report 2000-2008, December 2009. See also footnote 6.

⁷ TNO Report Economic and cultural effects of file sharing on music, film and games, February 2009.

⁸ PWC, Global entertainment and media outlook 2008-2013, 10th Annual Edition.

5. Not an excuse but neither a solution

Of course, facts and arguments provided in previous sections give no justification to infringe existing copyright laws. This is clearly not the point. But they prove that creative industries have a bright future in the digital age already under existing conditions. Since updating copyright to digital realities is all about stimulating growth of digital legal alternatives, the necessary digital update will even more improve the fortune of creative industries. This is a desirable outcome for all and hence is in the interest of ISPs, operators, technology vendors and end-users.

But a far-reaching copyright enforcement-focused only approach to a digital upgrade is not a sustainable solution. This is because:

- More than 50% of the legal digital consumers are also pirates¹⁰. Offering an appealing legal alternative is the leading motive for pirates (60%) to become legal consumers.¹¹
- Current copyright regime and conventional application of terms and conditions to commercialize creative works is part of the current problem, delaying and inadequately supporting the growth of appealing digital offerings. Enforcement-focused only approach misses this vital and extensive part of the equation: providing attractive legal alternatives.
- European citizens are asking governments of member states to encourage the growth of legal digital offerings and to reform existing copyright laws.¹²

6. Europe needs a transformative initiative to become a true digital area

First of all, within the EU's internal market, obstacles still stand in the way of the free movement of creative people, cultural activities and in particular of the digital distribution of products and services. In addition, permanent large scale illegal downloading can jeopardize the development of an economically viable single market for digital content. Attractive legal alternatives must be allowed to emerge and give European consumers an alternative choice.

⁹ Ibid.

¹⁰ Ericsson Consumerlab, Global Infocom Study 2009.

¹¹ Ipsos MediaCT, Digital Music Survey, 1 008 online interviews conducted in October 2009 amongst GB adults aged 16-50 years.

¹² Ibid.

It is therefore essential that proliferation of competing legal digital offers can evolve. These offers must allow consumers access to: timely available, versatile range of content of their choice at any time, to any device and in any place. Furthermore, as content markets shift, consolidate or vertically integrate, vigilance is needed to ensure that competition in creative and distribution markets remains effective.

It is important that the urgently needed update of copyright laws to digital reality and the commercialization conduct of creative works are based on policy efforts that are focused on the functioning of the total (physical and digital) creative and distribution markets, efficiency of total creative and distribution markets and overall socio-economic outcomes.

There is a need for a broad and transformative initiative to define an adequate future oriented European response to challenges such as:

- Fragmented copyright laws including private copy exemption
- Analogue licensing terms and conditions such as windowing, exclusive rights and territoriality
- Efficiency of the licensing process on national and pan-European basis.
- Fair remuneration principles for rights holders, including when double taxation occurs via collecting societies

All steps undertaken to remove obstacles mentioned above towards a vibrant European Digital Single Market are essential and much supported by Ericsson.

7. Clear digital vision an essential first step of a transformative initiative

Transformation of copyright and/or related commercial conduct e.g. terms and conditions that can support Europe to become a true digital area needs to be founded on a number of key policy principles that will guide all stakeholders towards common goals. These principles should at least be based on:

- Openness of the transformation process
- Inclusive transformation process - for all relevant stakeholders
- Focused on desired outcomes of the digital creative and digital distribution markets
- Focused on end-user digital choice, competitiveness and efficiency of the digital creative and distribution markets

- Balancing investment interest with end-user interest across the whole value chain, creative production, aggregation and distribution. Technology neutral approach with focus on creating a level playing field across digital distribution channels and delivery formats, e.g. linear, on-demand and on-line.
- Adopt a converged media perspective, a holistic perspective across ICT, broadcast and creative production with common policy denominators
- Focus on overall socio-economic outcomes not sub-industry protectionism

Ericsson believes that this initiative needs to be consistent with clear ownership and power of initiative. The initiative needs to define and commit to basic principles before stakeholders can engage in fruitful digital copyright policy discussion. We need to steer away from the special interest, privileged driven closed process of copyright. Based on these and other relevant policy principles the next appropriate step would be to define existing barriers in the copyright regime that are hindering the growth of attractive, competitive digital offerings. Some of the key solutions that should be considered in the review process are according to Ericsson well presented in the **DIGITALEUROPE** response to the reflection paper on creative content e.g.:

- The extension of the scope of the 1993 Satellite and Cable Directive to online delivery of audiovisual content
- A harmonized European Copyright
- Easier licensing (aggregation of layers of right holders), online database
- Alternative compensation systems

In addition Ericsson believes that:

- Potential vs. actual consumption, is a key digital policy principle. Copyright in digital age should focus on the right to use being transferred, e.g. one-time view (scheduled/on-demand), time limited view (e.g. 24 hours) perpetual (download to own). The right to use should be decisive factor for pricing digital content and not the transmitting network, device or screen. A given consumer should not pay more than once for given content and given right to use.
- Exclusive licensing should be complemented with a mandatory layered-licensing approach where multiple licenses are available in the market, e.g. with different time-release windows. Hereby end-user choice increases without limiting the possibility to sell or acquire exclusive first window.
- Release windows for on-demand VOD act as a barrier to the availability of digital content, in general as well as for specific delivery platforms. Pricing mechanisms can be appropriately equipped and content can be securely transmitted to maximize investment interest and at the same time make attractive content available in alternative channels.

- Important distinction should be made between 'on-demand' and 'on-line', especially from a copyright perspective, as making content available on-demand over IPTV (Telecom, Cable or hybrid networks) is not an on-line issue where content becomes available on internet, cross-territory in an uncontrolled manner.
- Traditional territorial licensing also hinders new technology and service developments like follow-me services whereby the consumer can seamlessly continue to consume content across Europe without the necessity for the media service provider to clear rights for all inhabitants of the "roaming" country, since the latter cannot access the service. This is a step in territorial dimension when European consumers can continue to enjoy their "home" market media services across Europe.
- Harmonization of private copy exemption needs also encompass technology neutrality. 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. Notably, PVR and *nPVR (network PVR)* have the same functions and should not be discriminated against by law or special consent from rights holders. Hereby, competition between technologies is allowed and most suitable solutions will be accepted by consumers. In addition, the follow-me service of nPVR should also be considered.
- Avoid double taxation of end-users e.g. direct licensing and levies. This adds to the legal digital cost of the service and irritates consumers.

Ericsson is a world-leading provider of telecommunications equipment and related services to mobile and fixed network operators globally. Over 1,000 networks in more than 175 countries utilize our network equipment and 40 percent of all mobile calls are made through our systems. We are one of the few companies worldwide that can offer end-to-end solutions for all major mobile communication standards.

Through our Sony Ericsson Mobile Communications joint venture we offer a range of mobile devices, including those supporting multimedia applications and other services allowing richer communication.

We invest heavily in R&D and actively promote open standards and systems. Also reflecting our ongoing commitment to technological leadership, we have one of the industry's most comprehensive intellectual property portfolio containing over 23,000 patents. Our origins date back to 1876. The parent company is Telefonaktiebolaget LM Ericsson (company registration number 556016-0680). Our headquarters are located, and the Board of Directors is seated, in Stockholm, Sweden.