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**Fastweb's contribution to the Commission's Reflection Paper on Creative Content Online in
European Digital Single Market – Policy/Regulatory issues**

Dear Sirs, please find attached Fastweb's contribution to the above Reflection Paper.

Best Regards

Giovanni Moglia

Director of Legal and Regulatory Affairs



EXECUTIVE SUMMARY

We welcome the Commission's initiative to launch a debate on the challenge of creating a European Digital Single Market for creative content like books, music, films or video games.

Whilst agreeing that the digital availability of content presents great opportunities for Europe, Fastweb would nonetheless point out that a number of challenges still stand in the way of the achievement of the above objective, by way of regulatory and territorial obstacles in the way of digital distribution of cultural products and services.

In particular, the artificial fragmentation and temporization of audiovisual rights market is not suitable for new Italian media market. The actual systems do not ensure new platforms the possibility of achieving the degree of competitiveness vis à vis traditional distribution platforms, which is necessary to operate profitably and develop their business; at the same time, it ends up depriving consumers from the desired services, and ends up fostering piracy and illegal downloads.

It is important to stimulate a deep restructuring in the way audiovisual rights are dealt with, through the adoption of measures which ensure the widest possible access of new media to audiovisual contents and should, in particular include: i) the re-organization of the windowing system in order to allow for the simultaneous release of movies in theatre, home video and VOD (**section 2**); (ii) the promotion of the so-called multi-platform approach, in particular, by ensuring that the use of exclusive/ holdback rights especially on new media is limited (**section 3**); (iii) the adoption of all measures needed to stimulate a deep restructuring in the way broadcasting rights are dealt, including by allowing rights to be dealt on multi-territorial or language basis, in order to let broadcasters deliver their schedules or programming across the EU and reach all categories of potential consumers and permitting the simultaneous release of content in different territories (**section 4**).

We also deem that the actual national rules implementing the rules on private copying (**section 5**) are still highly discriminatory towards new media content providers and that they should be adapted accordingly to the new means of content fruition.

Eventually, Fastweb has strong concerns over the possibility, mentioned by the Reflection paper, of introducing forms of compensation by companies – such as an “online subscription fee” - for mass reproductions and dissemination of copyright protected works by their costumers (**section 5**) and is convinced that the above referred changes in the distribution system would better address the issues giving rise to the Commission's suggestion.



All above proposals would not only help the diffusion of digital content but they would also greatly contribute to the overall consumer benefit, and to the strongly invoked fighting of piracy and illegal downloads. We deem that all these issues require a swift intervention at EU level, in order to ensure the achievement of a certain degree of harmonization across EU Member States. In Fastweb's view, the most appropriate instrument would be – considering the urgency – a Recommendation. However, because the latter would not have any binding effects, the Commission should also consider proposing intervention by way of Directives.

1. Introduction.

We welcome the Commission's initiative to launch a debate on the possible European responses to the challenges arising out of the digital "dematerialisation" of content and we appreciate the Commission intention to continue to take a pro-active role in order to ensure and speed up the development of a culturally diverse and rich online content market for consumers, while creating adequate possibilities for remuneration and improved conditions in the digital environment for rightholders.

In particular, we share the Commission's objectives of (i) *“creating a favourable environment in the digital world for creators and rightholders”*, by *“ensuring appropriate remuneration for their creative works”*; (ii) *“encouraging the provision of attractive legal offers to consumers with transparent pricing and terms of use, thereby facilitating users' access to a wide range of content through digital networks anywhere and at any time”*; (iii) *“promoting a level playing field for new business models and innovative solutions for the distribution of creative content”*.

However, as it will be better seen below, it is our belief that the above objectives and challenges may be strongly jeopardized – in the absence of intervention at EU level – due to persisting business practices and legislative boundaries still surviving at national level, which stand in the way of the development of digitization and, ultimately, in the overall interest of European citizens.

Fastweb's views and suggestions will be expressed as follows.



2. The impact of the digitization of contents on the audiovisual market.

With the digitization of content and the tools for its production, as acknowledged by the Commission the distribution of entertainment and information is increasingly shifting from the physical to the digital environment. In recent years, several new media based business models have developed on the European market, and new models emerge every day. The online distribution of audiovisual content has the twofold potential to increase the consumer welfare, by responding both to the end users' growing need and demand to shift to online services, as well as to increasing business opportunities for all the operators involved in the audiovisual value chain. It should also be noted that the full development of these new distribution models may increase the perception of the value of ultrabroadband connections thus contributing to the development of New Generation Access Networks. Nevertheless, existing commercial practices aimed at protecting existing revenue streams are hampering the full development of this new paradigm of distribution for audiovisual content.

The Windowing system – whereby specific content (movies, tv drama, series) is made available for distribution on different platforms at specific times – constitutes a perfect example of these practices. As a result of private contractual agreements between the producer (in its quality of licensor of the economic exploitation rights of the content) and the distributor or sales agent, such model is still widely adopted. According to it, in Italy, the first exploitation of movies is generally made available through release in movie theatres, then after 3-4 months by home video. As regards VOD, although it should be considered the “online correspondent” of the home video system, the relevant rights are only made available 90 days after home video availability.

The above mechanism is quite relevant for the development of new online services and, in particular, it has a high impact on VOD offering. As rightly recognized by the Commission, the “windows” system actually in place, not only “*can*” – as pointed out by the Commission itself – but in fact does act as one of the most important barriers “*to the availability of content on digital platforms across borders, because of the time lapse between VOD and other releases*”. As a result of the system in place, video-on-demand, which is one of the core services enabled by broadband and new generation networks, suffers a serious competitive disadvantage compared with home video.

This has negative consequences, both on the operators acquiring the relevant rights and trying to build sustainable VOD distribution models, and on consumers. In fact, the late window provided for



VOD forces consumers to resort to traditional outlets (i.e. video stores) to get hold of the movie or to illegal ways, therefore reducing to a great extent the possibility for new media platforms to achieve the necessary earnings and therefore creating significant barriers to the development of new business models. As pointed out by the Commission itself, “*release windows that are too long can hinder the emergence of attractive legal offers and stifle innovation*”. Moreover, windowing strategies constitute another source of opportunity for the development of grey market, and piracy, jeopardising both the development of a thriving European market for online content and destroying value for the producers and distributors.

On the contrary, the benefits of allowing VOD distribution at the same time as home video is proven, in Italy, by cases where this has been made possible by specific agreements with content providers. As an example, thanks to an agreement with RAI Cinema Fastweb has had the opportunity to offer to its customers a few titles at the same time (day/date) as that of the home video release. The impact in terms of performances has been extremely relevant as the movies released at the same time as home video have totalled an average of 60% more transaction compared to similar titles made available through the usual windowing scheme, thereby proving how the success of online business model is strictly related to the prompt availability of titles. The high percentage of clients that were interested in the movie constitutes evidence of the existence of a sound and strong consumer demand for online contents and the willingness to pay when such content is made available on the same terms of physical distribution.

As pointed out by the Commission, “*new online services require a more dynamic and flexible framework in which they can legally offer diverse, attractive and affordable content to consumers – which is in many instances an important part of the response to widespread illegal downloads*”. Also, “*consumers wish to access creative content on any media platform and in a way which allows them to choose the time when they view, read or listen to that content*”.¹

In light of the above, in Fastweb’s view, the Commission should consider encouraging the adoption, across Europe, of unique window systems for the exploitation on content for VOD and Home video. As the matter is becoming increasingly urgent, this could be done by way of a Recommendation

¹ See the Reflection Paper, p. 10 and 11.



aimed at the main players on the market. However, given the importance of setting a coherent approach and framework across Europe, perhaps the Commission should consider intervening by way of an ad hoc directive, an instrument which would also better satisfy the need of legal certainty and EU wide harmonization.

Eventually, we acknowledge the Commission remark that “*Online platforms do not generally contribute to financing the production of films and other audiovisual works in the same way as "traditional" distributors, in particular upstream investment, e.g. pre-purchase of rights*” and that “*online platforms do not yet play the important role that cinema exhibitors do in the promotion of films*”. In this regard, it should be noted that where the availability of online content has been increased - also thanks to new windowing schemes taking into account the growing demand of consumers to access audiovisual content through VOD and similar platforms (as it is the case in the USA) - new online distribution players have emerged and this has caused the rapid diffusion of ancillary web-enabled platforms such as game consoles, Blu-ray players, and hybrid set-top boxes, with the positive effect of turning the online business into a profitable one both for distributors and for the movie industry. According to the consulting firm The Diffusion Group, by 2014 the DVD rental revenues in the U.S. will exceed more than \$8 billion, while revenues from the on-demand delivery of Internet video to the TV will grow from \$621 million in 2009 to \$2.1 billion, accounting for more than 25% of total annual home video revenues.

3. Exclusive Rights

The development of Next Generation Networks is strictly related with the development of an adequate offer of audiovisual works, which in turn would cause consumers to exploit technical capabilities of the networks and their incentive to acquire broadband access.

ISPs and Over the Top operators are developing new business models aimed at offering new services for the distribution of content in the digital environment, for which the economic analysis suggests the existence of a growing demand. However, in order to gain any market shares, new platforms need



to be able to offer to their clients a complete catalogue that will enable them to compete with the content available in the offers of traditional pay TV operators.

Currently, the new media offers are hindered, inter alia, by the content providers' commercial practice to sell their works based on multiplatform exclusive rights or holdbacks clauses, granted in favour of specific players (often in dominant position on old media), thereby preventing the circulation of contents on new platforms. As a consequence, all involved players (new platforms, ISPs and aggregators of content for new media) have serious problems in accessing audiovisual works and therefore satisfying consumers' demand. The system in place ultimately results in great barriers to entry for the above companies, and an increase of illegal means such as piracy, on the side of consumers.

In sum, exclusive rights, by preventing consumers from watching their favourite programmes on the chosen platform, negatively affect the technological development and consumers' wellness. In turn, as a consequence of the above system, contents owners are prevented from effectively exploiting their IP rights on all digital platforms, and therefore from benefitting from new fonts of revenues.

To promote the so-called multi-platform approach, meaning that consumers can access broadcasting, information society services and telecommunications services from multiple platforms as such as telephone, TV set, and computer, is important that new media platforms become able to gain access to audiovisual contents. The Commission could contribute by encouraging good commercial practises that maximize the effective diffusion of audiovisual contents in the largest possible number of audiovisual packages and, in particular, by ensuring that the use of exclusive/ holdback rights especially on new media is limited.

4. Multi-territory rights licensing.

As correctly noted by the Commission, *“the audiovisual market in the EU remains territorially partitioned”*, but *“in the digital age, citizens want to access the same content on different platforms or across borders and should expect to be able to do so without impediment”*.



Fastweb fully shares the view of the Commission that, in the context of European integration, the traditional territoriality of rights' exploitation is increasingly conflict with the imperatives of a borderless single market, created by a supranational legal order. Rightly so, the Commission points out that the *“pan-European availability of audiovisual content, such as VOD services, is hindered by nationally-determined release windows that prevent simultaneous availability across the EU”*.

It should be noted that the segmentation in space descending from the territorial exploitation of rights causes similar effects to the ones produced by the above analyzed media release timeline. As the online distribution is characterized by relevant scale economies and would greatly benefit from the capability to distribute to several territories, the need to negotiate separately rights for each country has the effect of hampering the development of sustainable online distribution, by increasing rights' management costs, and preventing consumers from acceding content made available by online operators in other Member States.

As acknowledged by the Commission, the existing fragmentation of copyrights across Europe is not the result of the present legal framework, which does not in itself prevent right-holders from commercialising their works on a multi-territory basis. The problem lies more on the side of commercial and contractual practice, which is based on the existing fragmentation of copyright legislation in the EU and has led to a partitioning of the market. In this regard, the “traditional” ways of financing film production through box office, television rights and packaged media, which have led right-holders to partition the market for audiovisual content in the EU, should be thought better, as in the current system – based on exclusive licensing only in the country of production / co-production - consumers are deprived from choice and diversity.

We believe that the multi-territorial rights' licensing could be appropriate to meet the consumers' demand for new services, in line with the ubiquity of such on-line services. Such solution, by enabling users to receive the desired content in line – also from a timing standpoint - with their expectations, would also greatly contribute to putting an end to piracy - with additional benefits for the right-holders themselves -, which currently benefits from the lack of a legal offer at national level, when audiovisual contents are already available in a different country.



In Fastweb's opinion there is no reason why a producer or other rights holder should not consider voluntary exploitation on multiple distribution territories; these players could very well modify the current practice of territory-by-territory sales, and opt for marketing through pan-European online distribution.

On the Commission's side, in order to promote the freedom of service circulation and resolving the grey market issue (and to some extent also piracy), all necessary measures should be taken in order to stimulate a deep restructuring in the way broadcasting rights are dealt allowing European media services providers to deliver content to their potential consumer base when and where the demand exists. Such measures may include – in addition to the above requested reorganization of the windowing system - allowing rights to be dealt on multi-territorial or language basis in order to let broadcasters deliver their schedules or programming across the EU and reach all categories of potential consumers and permitting the simultaneous release of content in different territories.

As regards legal instruments, Fastweb notes that the problems currently faced by all stakeholders are pressing and require urgent action from the Commission. However, given the need of achieving a harmonized and “future-proof” framework, Fastweb believes that the adoption of an ad-hoc directive would be more appropriate.²

5. Exception of copyrights.

Articles 5.2 to 5.5 of the 2001/29/CE Directive contain an exhaustive list of limitations and exceptions to the rights of reproduction. This limited list was intended to enhance harmonisation and legal certainty throughout the Single Market. However, the exceptions and limitations contained in this list are only optional: Member States can choose whether or not to implement them. Moreover, these exceptions and limitations are expressed in a very broad way. Therefore, Member States have a

² See Fastweb's response to the Commission's 2008 Public Consultation on the Communication on Creative Content Online in the Single Market (COM(2007) 836 final), available at the following address:
http://ec.europa.eu/avpolicy/docs/other_actions/col_2008/comp/fastweb2_en.pdf



significant discretionary margin in deciding if and how to implement those provisions in their national laws.

In particular, as regards Private copy, Member States are allowed to adopt their own copyright limitations. Article 5.2.b of the Directive enables MS to provide for exceptions and limitations "*in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned*". However, only a few Member States have implemented article 5.2.b and the States that made it, had regulated the exception in a disomogeneous way. The absence of clear principles has also generated ambiguity in identifying the possible technologies that individuals may use for the purposes of creating a private copy. As an example, in some Member State the legislative framework seems to allow use of old technology of copy called "PVR³" (as DVD recorder) that works off line while preventing the use of enhanced technologies as Network PVR⁴.

The absence of clear principles of technological neutrality in the private copy exception actually allows Member States to implement national rules that discriminate between recording devices/technologies with same functionalities, only on the basis of their respective technological features. This could prevent parties in the Single Market from pursuing in the online environment practices, which would not be restricted in the offline environment. As a result, business ventures dealing with digital content will require more time and money to acquire all necessary permits. The above generates distortion in the market and prevents the development of technological innovation.

³ VCRs, introduced for home use more than 25 years ago, provided the first practical means for television viewers to record programming. VCRs capture programming from television signals and record it onto magnetic tape housed in a video cassette or DVD.

⁴ N-PVR (network personal videorecord) is a functionality offered by IPTV/Cable operators that allows a natural person to record portion of scheduled programmes broadcasted by the same operators. The customer controls the recording by using the same remote control and on screen interface as with traditional PVR (i.e. the REC switch is pressed to record a programme). Unlike traditional PVR (VHS recorder) the recorded content is not stored locally (on a VHS tape) but on central server provided by the Cable operator



Against this situation, the commission should make clear that the limitations and exceptions to the rights of reproduction should be interpreted on the basis of the principle of technological neutrality and therefore by allowing consumers to use any existing technology (device, system or service with same function reproduction function) for the purposes of creating a private copy.

6. Alternative forms of remuneration.

Fastweb has strong concerns over the possibility, mentioned by the Reflection paper, of introducing forms of compensation – such as an “online subscription fee” - by companies for mass reproductions and dissemination of copyright protected works by their costumers.

Such levy could have very negative consequences on the development of IT society. Albeit limited to unauthorized file sharing and reproduction, it would give rise to an undifferentiated burden for access by targeting also customers that are interested in other functionalities. A result, which would totally contradict the objective of fostering the development of the information society and in particular – as provided for in the Lisbon Agenda – the penetration of broadband. In times where the great uncertainty on the return on investments risks jeopardizing NGNs development, such additional burdens on operators would add up in reducing any potential roll-out of new networks.

The proposed approach would also completely destroy any possibility of pursuing content related businesses that are based on quality / price differentiation: in the presence of such charging mechanisms it would be simply impossible to consider developing a business based on legal distribution of contents, which would be strongly undermined by the further diffusion of forms of sharing lacking any control.

On the contrary, Fastweb is convinced that there may be a way for developing the market for contents based on successful and legal business models, according to the above proposed solutions (re windows and exclusivity).



6. Conclusions.

The Commission's Reflection Paper offers once again the chance to identify the issues affecting the development of new platforms and preventing, to date, the achievement of a truly single market for content.

Whilst sharing the Commission's objectives, we deem that in order to ensure the continuous successful deployment of digital business models, the existing legal framework should be upgraded to adequately regulate the new relationships between players active online in the EU market.

This is particularly true in the field of copyright and related rights where the technological development in recent years has opened up new ways of distributing, storing, marketing and using protected works. The legal framework for copyright and related rights protection has to match this challenge and to be adapted accordingly, in order to foster the development of new business models and ensure – also in line with the objectives within the Lisbon Agenda – the wider penetration of broadband across all EU Member states.

In Fastweb's view, the EU legislator should adopt guidelines or a directive to define a legal framework capable of adapting to changes in the technology and in the market situation and of contributing to the establishment of a balance of interests between rights owners and users of audiovisual content on new platforms.